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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1925—No. 94.

L. LITTLEJOHN & COMPANY, INC., *et als.*,
Appellants,

—against—

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF APPELLANTS.

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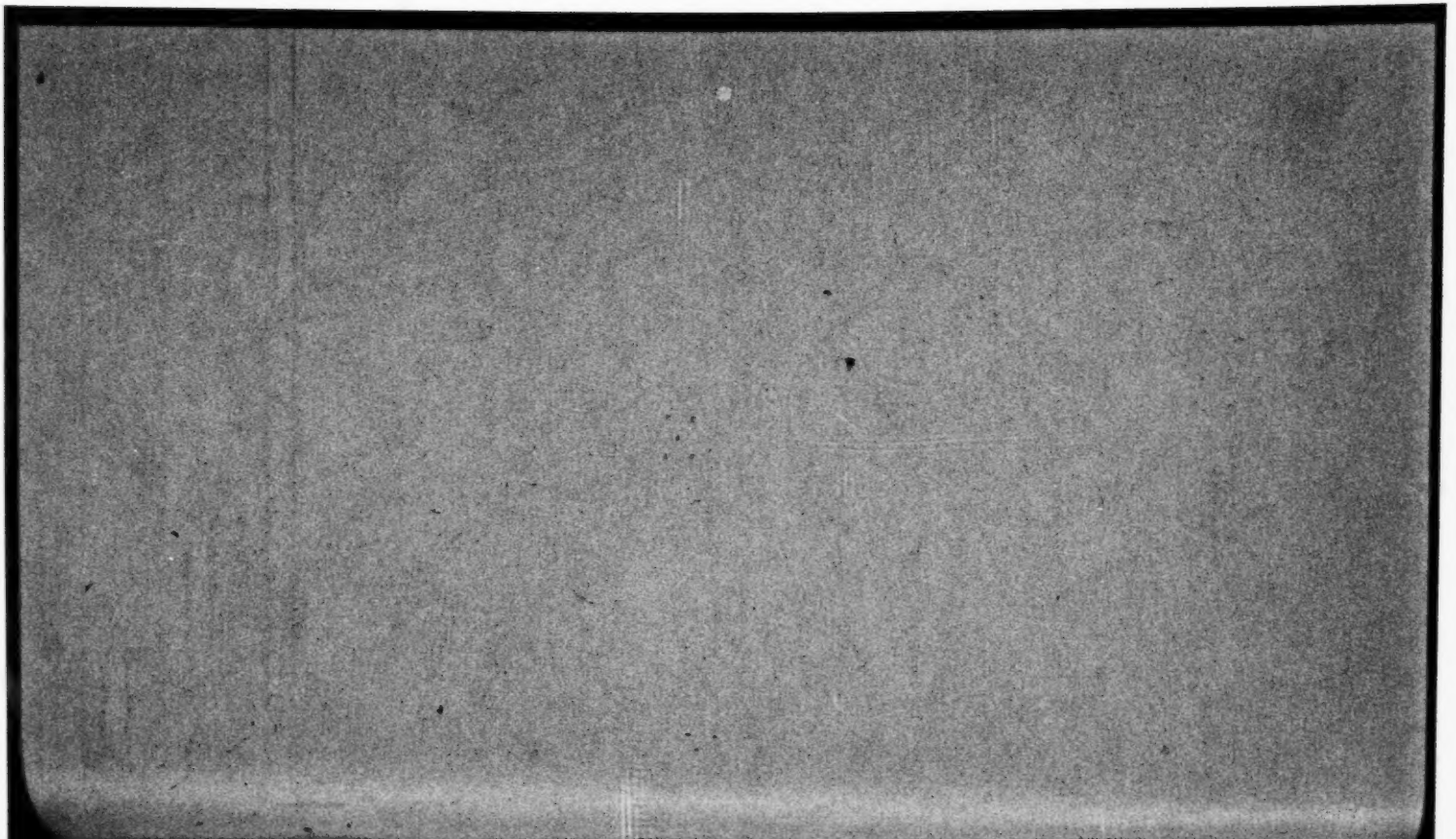

SUBJECT INDEX.

PAGE

PROCEEDINGS BELOW 1

Opinion of District Court 1

JURISDICTION 1

Questions certified by District Court 2

STATEMENT OF THE CASE 5

Libels 5
Claim 5
Exceptions to Claim 6
Answer to Claim 6
Hearing of Claim by Circuit Judge Hough 6
Judge Hough's Opinion 8
Trial before Judge A. N. Hand 9

POINT I. The relation of the United States to the seized German ships, including the *Antigone*, was the same as the relation of the Alien Property Custodian under the Act of October 6, 1917, to the other enemy-owned private property afterwards seized by him 16

The United States claimed no property interest in the *Antigone*, and did not promise to compensate her owner for physical injuries or collision liens suffered by her. Therefore the United States was liable not personally, but merely officially as custodian or receiver, and the question is simply

PAGE

whether damages resulting incidentally from the service which the *Antigone* was performing at the time of the collision should fall on the German owner whose vessel violated the collision rules, or on innocent American and British cargo and shipowners who were injured by such violation. The appellants' contention is that the damages should fall on the German owner because the sovereign of the German national was causing the necessity for the service of the *Antigone,* and because that would be the normal application of the maritime law.... 20

POINT II. The United States has failed to prove that the *Antigone* at the time when the collision occurred had a status which would prevent the ordinary maritime lien which arises from collision from attaching to her..... 26

POINT III. This suit if brought immediately after the collision, whilst the *Antigone* retained the status she then occupied, could not have been regarded as a suit in which the United States or any of its property in effect was being sued.... 40

POINT IV. This matter is justiciable and not political 46

POINT V. This suit is brought against the United States not because of any relation it had to the *Antigone* at the time of the collision on October 9, 1919, but because a maritime lien for collision

PAGE

arose at that time on the *Antigone;* because this lien is a property right; and the United States has taken over title to the vessel under the treaty, subject to this property right of the appellant.. 50

POINT VI. The relation of the United States to the *Antigone* at the time of the collision was substantially that of a licensee. In April, 1917, it sequestrated her, and in May, 1917, asserted the privilege of using her as licensee or trustee without confiscating or promising to pay for her use. In other words, the United States never "took" any property interest in the *Antigone*..... 52

POINT VII. If construed as a confiscation the Resolution of May 12, 1917, is unconstitutional because it violates international law..... 57

POINT VIII. The President did not seize or take over the possession of the *Antigone* after the adoption of the Resolution of May 12, 1917.... 76

POINT IX. The District Court had no jurisdiction on its admiralty side to entertain a claim of the United States. The Court should therefore have granted the motion of the libellants to transfer the claim proceeding of the United States to the prize side and permit the collision libels to be proved as cross suits or intervening claims in that proceeding 81

PAGE

POINT X. The Resolution is unconstitutional because it reduces the extent of the constitutional grant of admiralty jurisdiction to the judiciary and impairs the substantive international maritime law 108

POINT XI. By granting immunity in the present case this Court would be extending the theory of immunity beyond any of its existing decisions 112

CONCLUSION 134

APPENDIX—Unreported opinion in *Furness Withy & Co.* v. *Miller* 135

AUTHORITIES CITED,

Decisions.

PAGE

Appam, 243 N. S. 124, 153.....32, 82, 85

Barnstable, 181 U. S. 464, 467..... 27
Brown v. *U. S.*, 8 Cranch 110, 129.....63, 70
Buena Ventura, 175 U. S. 384..... 95
Burnap v. *U. S.*, 252 U. S. 512, 514..... 78

Caledonian, 4 Wheaton 100..... 101
Central Trust Co. v. *Garvan*, 254 U. S. 554, 569..... 18
Charming Betsey, 2 Cranch 64, 118..... 68
Chile, L. R. 1914 Pr. Div. 212, 215..... 38
China, 7 Wall. 53.....26, 28, 120
Chisholm v. *Georgia*, 2 Dallas 419, 466..... 69
Clarita, 23 Wall. 1..... 27

Dewey v. *U. S.*, 178 U. S. 510..... 103

Edna, 3 Br. & Col. Pr. 407, 420..... 37
Exchange, 7 Cranch 116..... 36
Ex parte Muir, 254 U. S. 522, 532..... 33
Ex parte New York, 256 U. S. 490, 503..... 31

Flad Oyen, 1 C. Rob. 114..... 106

Gableman v. *Peoria Ry.*, 179 U. S. 335, 338..... 109
Gray v. *Grand Trunk Ry.*, 156 Fed. 736..... 45

Hamilton v. *Kentucky Distillers*, 251 U. S. 146, 156.. 58

Jecker v. *Montgomery*, 13 How. 198.....91, 105
John Frazer, 21 How. 210, 233..... 26
John G. Stevens, 170 U. S. 113, 120..... 27
Joseph, 8 Cranch 451, 455..... 100

PAGE

Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149.... .....109, 122, 123

MacLeod v. *U. S.*, 229 U. S. 416, 434..... 66
Malek Adhel, 2 How. 210, 233.....26, 28
Marie Leonhardt, 1921 Pr. Div. 1..... 37
McNulta v. *Lochridge*, 141 U. S. 327, 331..... 45
Merrimac, 14 Wall. 199..... 27
Miller v. *U. S.*, 11 Wall. 268, 305.....23, 57, 58
Murray v. *Chicago Co.*, 92 Fed. 868..... 68

Nassau, 4 Wall. 634, 640.....89, 90

Oakes v. *U. S.*, 174 U. S. 778, 786..... 88

Palmyra, 12 Wheaton 1, 14..... 26
Panama, 176 U. S. 535..... 96
Paquete Habana, 175 U. S. 677, 711.....4, 69, 97
Pedro, 175 U. S. 354.....38, 94, 104
Peggy, 1 Cranch 103..... 73
Pellworm, 15 Asp. M. C. 101..... 38
Peterhoff, 19 F. Cas. 11025..... 83
Pollard v. *Kibbe*, 14 Peters 353, 402..... 71

Ralli v. *Troop*, 157 U. S. 386..... 27
Resolution, 2 Dall. 1..... 92
Rita, 89 Fed. 763.....39, 104

San Pedro, 175 U. S. 354.....38, 94, 104
Santo Domingo, 119 Fed. 388..... 98
Sawyer v. *Maine*, 12 Mass. 291..... 84
Scotia, 14 Wall. 170, 187..... 69
Society v. *New Haven*, 8 Wheaton 464..... 72
Siren, 7 Wall. 152.....85, 91, 120

PAGE

Texas & Pac. Ry. v. *Bloom*, 164 U. S. 636..... 42
Texas & Pac. Ry. v. *Johnson*, 151 U. S. 81..... 44

U. S. v. *Chemical Foundation*, 5 Fed. (2d) 191, 205. 19
U. S. v. *Percheman*, 7 Peters 51.....63, 70
U. S. v. *Steever*, 113 U. S. 747..... 103

Walters v. *Payne*, 292 Fed. 124, 127..... 111
Western Maid, 257 U. S. 419.....
.....20, 22, 31, 33, 67, 112, 113, 115, 118, 119
Wilhelm Holmsoth, 13 Asp. M. C. 115..... 38
Workman v. *City of New York*, 179 U. S. 552, 572.. 27

Young v. *U. S.*, 97 U. S. 39, 60..... 94

MISCELLANEOUS.

Government's Brief, *U. S.* v. *Chemical Foundation*.47, 48, 60, 78, 80

Newton D. Baker, Progress and the Constitution, p. 77 59

Jethro Brown, Austinian Theory of Law, p. 194.... 116

James M. Beck, Constitution of U. S., p. 225..... 116

James Bryce, Studies in History, etc., p. 538..... 116

James C. Carter, Law, Its Origin, etc..... 116

Benjamin N. Cardozo, Growth of the Law, p. 117.. 116

Cooley, Constitutional Law, p. 123..... 69

Dillon, Marshall, Life, etc., Vol. 1, p. 566..... 70

PAGE

John Chipman Gray, Nature and Sources of Law, pp. 74, 233, 288 116

Sixth Hague Convention, 1907, Arts. 1 and 2 65

Alexander Hamilton (Camillus Letters) 25, 71, 72

Charles Merrill Hough, Admiralty Jurisdiction of Late Years 117

Charles Evans Hughes 59, 60

Senator Philander C. Knox 24

Harold J. Laski, Responsibility of the State 113

Harold J. Laski, Foundations of Sovereignty, pp. 109, 126 116

J. M. Lightwood, Nature of Positive Law, p. 417... 116

John Bassett Moore 26, 63, 70, 85, 107

Naval Prize Orders 98, 99, 100

34 Opinions, U. S. Attorney General, 320, 325..... 55

Pound's Juristic Philosophy 116

Roscoe Pound, Spirit of the Common Law, pp. 83-84 116

John W. Salmond, Jurisprudence, pp. 202-203..... 116

Frederic J. Stimson, Popular Law Making, p. 10... 116

Tardy's Smith on Receivers, Vol. 1, pp. 245-248; Vol. 2, p. 1555 .....40, 41

Treaty with Prussia, 1799, Arts. XXIII and XXIV. 71, 74

Treaty with Germany, August 25, 1921..... 73

Treaty of Versailles 74, 75

PAGE

Constitution, U. S., Art. 2, Sec. 2..... 51

Paul Vinogradoff, Outlines of Historical Jurisprudence, p. 86..... 116

German Ambassador's Note to Secretary of State Kellogg, Aug. 12, 1925..... 75

LAW REVIEWS.

55 American Law Review 877..... 74

56 American Law Review 770..... 67, 121

10 California Law Review 311, 333..... 67, 127

22 Columbia Law Review 589..... 67, 123, 128

32 Harvard Law Review 447..... 114

34 Harvard Law Review 765..... 113

34 Harvard Law Review 777..... 61

37 Harvard Law Review 528..... 117

17 Illinois Law Review 57..... 123

18 Illinois Law Review 294..... 116

20 Michigan Law Review 416..... 35

20 Michigan Law Review 477..... 108

20 Michigan Law Review 533..... 67, 123, 129

7 Minnesota Law Review 113..... 71

52 Pennsylvania Law Review 185..... 126

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BRIEF OF APPELLANTS.

Proceedings Below.

Opinions of District Court:

Unreported opinion of Circuit Judge Charles M. Hough (R. 22).

Order of Judge Hough accompanying opinion (R. 23).

Opinion of District Judge A. N. Hand (R. 56). 1923 American Maritime Cases 219.

Final decree (R. 58).

Jurisdictional certificate of District Court (R. 58).

Jurisdiction:

This is an appeal taken May 26, 1923 (R. 61), under Section 238 of the Judicial Code (as it existed before the Act of February 13, 1925), from a final decree of

the United States District Court for the Southern District of New York entered February 28, 1923 (R. 58).

The decree sustained a claim or suggestion of the United States Attorney at New York, and dismissed collision libels in admiralty for want of jurisdiction (R. 58).

The libellants, the appellants here, had contended in part that the Court should dismiss the claim of the United States Attorney on the ground that it had not been properly presented. They also contended that the Court had jurisdiction to hear it only provided the United States would consent to the libellants' motion to transfer the claim to the prize side of the Court.

The District Court on February 28, 1923, after reciting the proceedings and claims of the respective parties, certified the following questions to this Court (R. 58):

> "Now, therefore, it is certified that the issues upon which these causes were decided were the following:
>
> 1. Whether or not this Court had jurisdiction of this cause.
>
> 2. Whether or not Congress by the joint resolution of May 12th, 1917, intended that the President after taking over the immediate possession of the vessels by seizure should take over the right to use and the title by deposit of the seized vessel's value or by prize court proceedings as required by International Law.
>
> 3. Whether or not the joint resolution of Congress of May 12th, 1917, as interpreted by the respondent, although in violation of International

Law, should be regarded as valid and binding on this Court.

4. Whether or not the joint resolution of Congress of May 12th, 1917, as interpreted by the respondent, was constitutional.

5. Whether or not the Treaty of Peace of July, 1921, between Germany and the United States by confirming all departmental orders cured the defective seizure so as to deprive libellants of any lien or remedy they had in February, 1921, at the time these suits were commenced.

6. Whether or not the interest of the United States in the Steamship *Antigone* at the time of the collision involved herein was sufficient to make her a sovereign vessel entitled to immunity from the ordinary liabilities of private vessels.

I found:

1. That this Court was without jurisdiction.

2. That Congress by the Joint Resolution of May 12, 1917, did not contemplate a deposit of the vessel's value, or proceedings in a prize court.

3. That, as so interpreted, the resolution, although in violation of International Law, should be regarded by this Court as a valid exercise by Congress of its war power.

4. That, as so interpreted, the resolution was constitutional.

5. That the Treaty of Peace of July, 1921, between Germany and the United States confirmed retroactively the executive orders in the years 1917 and 1918 with reference to the Steamship

Antigone so as to deprive the libellants of any lien or remedy they had in February, 1921, at the time these suits were commenced.

I, therefore, dismissed the libels.

I further certify that these are the only questions of law upon the pleadings and process for the decision of the Supreme Court of the United States, and that this Certificate was granted at the term in which the decree in this case was entered."

The foregoing findings of Judge Hand are the errors of which complaint is made by the appellants.

The record on appeal was filed on June 14, 1924. The appeal was therefore pending in this Court when the Act of February 13, 1925, became effective.

By Section 14 of that Act appellants' right was preserved to invoke the jurisdiction of this Court.

A great many decisions of this Court might be cited in support of its jurisdiction in this case.

It has jurisdiction:

1. Because of the certificate by the District Court of the question of jurisdiction.

The Pesaro, 255 U. S. 216, 218;
The Paquete Habana, 175 U. S. 677;
Kirby v. *American Co.*, 194 U. S. 141;
Bowker v. *United States*, 186 U. S. 135;
Powers v. *Chesapeake R. Co.*, 169 U. S. 92, 96.

2. Because of the Constitutional questions involved.

Raton Co. v. *Raton*, 249 U. S. 552;
City of New York v. *Consolidated Gas Co.*, 253 U. S. 219;
Arkansas v. *Schlierholz*, 179 U. S. 598.

And

3. Because of the question involving the construction of the Treaty with Germany.

Mitchell v. *Furman*, 180 U. S. 402.

Statement of the Case.

Libels:

This is a consolidated collision suit in admiralty. The collision occurred in New York Harbor on October 9, 1919, between the steamships *Antigone* and *Gaelic Prince*.

The amended libels allege that after the collision the United States, by the Peace Treaty with Germany, acquired the right of possession of the *Antigone*, subject to the collision lien. The libels are therefore brought in accordance with the Suits in Admiralty Act of March 9th, 1920, against the United States *in personam*, as a substitute for libels *in rem* against the *Antigone*, to enforce the maritime lien which was created against her by the collision.

Claim:

The United States Attorney at New York filed a claim or suggestion that the United States acquired possession and title to the *Antigone* before the Peace Treaty and before the collision, and therefore that when the collision occurred she was a public vessel immune from liability to the collision lien.

The claim was based on the alleged fact that the

President had acquired possession and title by capture or seizure of the *Antigone* as an enemy merchant vessel in a United States port in accordance with a joint resolution of Congress of May 12, 1917.

Exceptions to Claim:

The libellants, the appellants here, excepted to the jurisdiction of the Court on its admiralty side to entertain the claim. These exceptions were based on the points of law and fact which form the body of the present brief.

Answer to Claim:

The libellants also filed an answer (R. 20) denying the allegations in the claim.

Hearing of Claim by Circuit Judge Hough:

The claim and its answer were brought on for hearing on motion of the United States on September 28, 1922, before Circuit Judge Charles M. Hough (R. 22).

Two Assistant United States Attorneys appeared in support of the claim.

They admitted that they were unable to produce the usual commission or certificate of the *Antigone* as a public vessel at the time of the collision. Nor did they produce the commanding officer or master of the *Antigone*. Nor did they present any statement from the master or any proof that he had a commission from the President or the Secretary of War.

Nor did they present any claim by the master of the *Antigone*, the President of the United States or the Secretary of War or Navy or any other proper officer

that the *Antigone* was immune from liability to collision liens because she was a public vessel.

The appellants objected, therefore, at the outset of the hearing that an admiralty court in a collision suit could not accept as proof of possession and privileged public status a claim of Assistant Attorneys based on acts of force, especially as these acts of force had not yet been approved on the prize side of the courts by an order of requisition or detention, and raised questions of international law and interpretation of treaties.

These circumstances made the United States Attorneys' claim really a proceeding to quiet or establish right of possession rather than a claim cognizable in an admiralty court.

It was further objected that if such a claim was cognizable in this collision suit it was so independent of the libels as to constitute a submission to the jurisdiction of the Court, enabling it on equitable principles to recognize the collision lien.

The appellants were willing, however, that the District Court entertain the claim, provided they were given the same right that they would have on the prize side. The usual practice is to have an order entered on the prize side detaining or requisitioning the vessel, or to deposit her appraised value. If the Government had followed this practice its claim would have been regarded as a submission to jurisdiction, and the appellants' collision lien would have been enforced as a condition to entry of an order or decree for the Government.

Without ruling finally on the objections, Judge Hough notified the United States Attorney that he would receive in evidence all the testimony, documents and proofs

of every kind that he wished to introduce in support of the claim. The United States Attorney then introduced the following documents which are recited in Judge Hough's order (R. 24):

> "(1) a certified copy of an order transferring the *Antigone* to Army Transport Service, dated September 24, 1919;
>
> (2) a certified copy of joint resolution adopted by Congress and approved by the President May 12, 1917;
>
> (3) an executive order issued August 29, 1917;
>
> (4) affidavit of Frank H. Phipps, Jr., Major C. A. C., verified 26th September, 1922."

The Government then rested:

The libellants filed in opposition an affidavit of Bernard M. Baruch, verified September 27, 1922.

Judge Hough's Opinion:

Judge Hough then took the claim under submission and on September 29, 1922, filed an opinion (R. 22) and an order (R. 23) holding that the Government's claim had not been sufficiently proved.

> "But I am not authorized to take judicial cognizance of this matter, and I am persuaded that the documents and affidavits submitted on the suggestion-hearing, do not and cannot tell the whole story. I should want to know what the United States had done to the vessel, whether it had been re-built and re-conditioned, how it was manned and especially what, if any, steps had been

> taken by the original private German owner to maintain or re-assert any claim of ownership in the original *Neckar*. In short, I do not think that a sufficient ground-work is laid for the argument made at bar" (Judge Hough's opinion, R. 23).

He also held that the Government's claim as presented was "bad practice" and was really an independent proceeding which should be tried separately on the regular trial calendar, and:

> "That upon the trial of said issue the burden of evidence shall in the first instance be upon the United States, which shall be obliged to produce evidence showing the facts, if any, which resulted in the alleged ownership, title and control of said United States in and of said *Antigone*" (Judge Hough's order, R. 24).

Judge Hough then ordered that the claim proceeding be tried at the head of the next admiralty trial calendar (R. 24). The United States Attorney did not appeal from Judge Hough's order and has not assigned it as error in this Court.

Trial Before Judge A. N. Hand:

The claim proceeding came on for trial a second time on the regular admiralty trial calendar before District Judge A. N. Hand and was tried on October 10th (R. 25-26), October 11th (R. 27), and October 17th (R. 35), 1922.

Only the same two Assistant United States Attorneys appeared in support of the claim. Notwithstanding Judge Hough's opinion and order, they offered in sup-

port of the claim substantially nothing more than the affidavits and documents which Judge Hough had held insufficient and which are designated in Judge Hough's order (R. 24).

The only further proof offered by the Government at this three-day trial before Judge Hand consisted of the testimony of two witnesses, Anthony Lynch and Benjamin Pender, and the following documents:

1. Exhibit 1 (R. 43), a letter dated July 14, 1917, from one of the commissioners of the United States Shipping Board to Lynch, a civilian at New York.

2. Exhibit 6 (R. 46-49), reports showing the appraisal of the *Antigone* (ex *Neckar*) on May 1, 1918, by a board of survey in the sum of $424,260.

3. Exhibit 7 (R. 49), copy of an order changing the name of the *Neckar* to *Antigone*.

4. Exhibit 8 (R. 50), a certificate of registry of the *Antigone* as a merchant vessel of the United States issued on May 3, 1921, superseding provisional certificate of registry No. 440, issued at New York on March 19, 1921 (R. 51), which provisional register was based not on any previous United States commission or certificate of the vessel, but on the "Act of May 12, 1917" (R. 50); and

5. Exhibit 9 (R. 52), a certificate dated October 5, 1922, of the Chief Clerk of the Department of State that the files of his Department contained no application "either directly or through the German Government for the return of the steamship

> *Antigone* * * * nor has this Department any record of a claim for compensation having been filed by the former owners."

The witness Lynch, called by the Government, testified that he went on board the *Antigone* in the Navy Yard at Norfolk in July, 1917, while some unknown workmen in dungarees, or working clothes, were on board, and tacked on her a copy of a letter to him from one of the commissioners of the Shipping Board reciting that he was "to take possession of her in the name of the United States Shipping Board for and on behalf of the United States of America" (R. 43). Lynch further testified that he left the vessel within half an hour after going on board and never returned or appointed a successor.

The other witness, Pender, was called by the Government for some strange and irrelevant reason to testify that in May, 1920 (R. 23), several months after the collision, he made repairs to the *Antigone* in reconditioning and fitting her out for service as a passenger ship (R. 32).

The Government then rested.

No evidence was offered to show that the *Antigone* at the time of the collision had the usual commission or certificate of a vessel of the United States. All that was attempted to be shown was that on September 24, 1919, Colonel Phipps at New York had "placed a master, officers and crew on board the *Antigone*, who were at that time sworn in in the U. S. Army Transport Service" (R. 46); but it was not shown who these persons were or what their story was as to the character of the vessel, or the service she was fitted for or was performing.

Indeed, the Assistant United States Attorney conceded that "The Government does not question the fact that the master of the *Antigone* would again testify that the *Antigone* was in charge of Pilot Wood" (R. 36).

Pilot Wood was a civilian employe of a New York Pilot Association (R. 25).

Judicial notice can be taken of the fact of common knowledge that public vessels not only do not employ these civilian pilots, but are never in charge of any civilian not holding a commission from the President as an officer of the United States. This admission of the master of the *Antigone* and of the United States Attorney that a civilian employe of a private pilot association was in charge of the *Antigone* at the time of the collision, apparently under an independent contract of some sort, would seem to show clearly the civilian and non-public status of the vessel.

Nor was it shown that the United States had assumed any obligation to make compensation to her private German owners for damages suffered by her or for collision liens incurred by her during her war service. In other words, there was no proof that the Government had assumed the marine operating risks.

The proof showed that the *Antigone,* at the time of the collision, was merely an empty vessel without cargo (excepting a few boxes of household effects) or passengers, without a commission or certificate, excepting her German certificate, and without any person on board holding a commission from the President as an officer of the United States.

She was merely a temporary floating platform designed for private German purposes which might be of some use to the United States Army if she arrived at

France and was re-conditioned, but which the United States had not seen fit on October 9, 1919, to commission or certificate as a vessel of the United States, either public or private.

No evidence was introduced to show that the office at New York had anything to do with booking passengers or troops for her proposed voyage from France to New York, and there was no evidence regarding the time at which it was intended that that voyage should begin.

It was not even shown that the *Antigone* was not at the time of the collision flying the German flag, which she was entitled to fly under her uncancelled German merchant vessel register (Stimming, R. 55).

The libellants then moved to dismiss the Government's proceeding on the grounds set forth on page 35 of the Record. This motion was denied and an exception noted (R. 35).

The libellants then offered in evidence (R. 55), by consent (the United States specifically waiving the right of cross examination—R. 25), the affidavit of Carl J. Stimming, the Director General at Bremen of the Nord Deutscher Lloyd. This affidavit stated that at the time of the collision the *Antigone* was still registered at the Court Registry in Bremen, her home port, as the property of the Nord Deutscher Lloyd, and that no transfer had ever been made to the United States of possession of or title to that vessel, and that:

> "Neither the United States of America nor any other Government has ever put the said steamer through a prize court, either for purposes of detention, seizure, condemnation, requisition, or otherwise" (R. 55).

Director General Stimming further testified that "in April, 1917, certain persons purporting to represent the United States came aboard the said steamer and took possession thereof and removed the master and crew, and that the master protested to said persons against the seizure of the ship" (R. 55). He further testified that the *Antigone* "had been laid up at the port of Baltimore following the outbreak of the European War in 1914" (R. 55).

The libellants also offered without objection by the Government an affidavit of Bernard M. Baruch (R. 53), confirming the statements made in his recently published treatise. Mr. Baruch testified that he was the Economic Advisor to the American Commission to Negotiate Peace between Germany and the United States, and that, at the Peace Conference, in the years 1919 and 1920, the British and French delegates protested the claim of the United States to possession of the German merchant ships, including the *Antigone,* which had been seized while lying in United States ports. This protest was based on the ground that the ships "were entitled to fly the German flag" (R. 53), and that the claim of the United States was unfounded, because the seizure of the vessels had not been followed by "prize court decisions" (R. 53-54). He further testified that President Wilson finally agreed, subject to confirmation by Congress, to pay "for reparation account up to the fair value" of the German ships seized in United States ports provided the protests would be withdrawn.

The libellants then called as a witness John Foster Dulles, of the firm of Messrs. Sullivan & Cromwell. Mr. Dulles, during the Peace Conference, was the Financial

Advisor to the American Commission to Negotiate Peace appointed by the President of the United States (R. 36). Mr. Dulles was asked whether the President of the United States had not, in his presence and before the Assembly at the Peace Conference, formally admitted and acknowledged:

> "that neither he nor the United States had ever taken over lawful possession of or title to the German merchant vessels, including the *Neckar*, later known as the *Antigone*, which were interned in United States ports at the outbreak of war between the United States and Germany" (R. 39).

This evidence was offered as an admission by the United States (R. 38), and also:

> "to contradict the Government's evidence by showing the untruth of the allegation by the Government in its suggestion of want of jurisdiction that the President of the United States took over either the immediate possession or the title to the *Antigone* in July, 1917" (R. 38-39).

The question was objected to "as being a matter of State privilege" (R. 36).

The objection was erroneously sustained.

Further questions on the same line designed to show the execution of an agreement or treaty between President Wilson on behalf of the United States and the other representatives at the Peace Conference with respect to the *Antigone* and other seized ships were also objected to and excluded on the same ground of State privilege (R. 36-42).

The libellants and the United States Attorney then rested and after oral argument and briefs, Judge Hand took the case under submission.

On January 23, 1923, Judge Hand filed an opinion (R. 56, 1923 A. M. C. 219), sustaining the claim and dismissing the libels for want of jurisdiction.

On February 28, 1923, he entered a final decree (R. 58), and certified (R. 58-60) the questions involved to this Court.

FIRST POINT.

The relation of the United States to the seized ships, including the *Antigone*, was the same as the relation of the Alien Property Custodian under the Act of October 6, 1917, to the other enemy-owned private property afterwards seized by him.

The resolution under which these ships were seized was drafted and passed hurriedly in May, 1917. Several months later, in October, 1917, after careful consideration and drafting, the first Trading with the Enemy Act was passed, creating the office of Alien Property Custodian, and authorizing the seizure of all enemy-owned private property.

If the ships had not already been seized they would certainly then have been seized by the Alien Property Custodian.

The debates in Congress with reference to the resolution of May, 1917, correspond almost exactly with the debates with reference to the act afterwards passed in October, 1917.

These debates show that Congress intended to treat all enemy-owned private property alike.

The property, including the ships, was merely to be seized and continued in normal operation during the war, the United States assuming none of the operating risks nor receiving as its own any of the operating profits. The use of the term United States with reference to the operation of the seized ships has exactly the same significance as the term Alien Property Custodian under the Act of October 6, 1917, with reference to the other seized enemy property. The United States was merely a receiver, sequestrator, custodian, or licensee of the ships and other seized enemy property.

Undoubtedly, if the Alien Property Custodian had been in existence, when owing to the exigencies arising at the beginning of the war, the interned German vessels were taken into the custody of the United States, the procedure which would have been followed regarding these vessels would have been that after taking them into his custody, the Alien Property Custodian would have given the United States a free license to use them during the war, as was done with most of the German-owned patents. If this approach is taken to the situation involved in this case many obscurities in the legal relationships involved are clarified.

The *Antigone* normally operated in regular liner service between Europe and New York as a passenger and cargo carrier. The war stopped this operation temporarily. The United States in May, 1917, merely decided to continue the normal operation of the *Antigone* as a going concern. This was done by the Alien Property Custodian with reference to numerous other enterprises temporarily stopped by the war.

The only real differences between the actual operation of the *Antigone* between New York and Europe by the

United States during the war and the operation by her owner in peace time were that during the war the payment to her owner of charter hire, freight and passage money was suspended. On the other hand he was saved the immediate disbursement of operating expenses.

In *Central Trust Company* v. *Garvan*, 254 U. S. 554, 569, Mr. Justice Holmes, delivering the opinion of this Court with reference to the Amendment of March 28, 1918, which broadened the powers granted to the Custodian under the Act of October 6, 1917, said:

> "To the conclusion that we reach it is objected that the Custodian gets a good deal more than bare possession—that the property is to be conveyed to him, and that by the Act of March 28, 1918, c. 28, 40 Stat. 459, 460, enlarging Section 12, the Custodian 'shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be required to be conveyed,' etc., to him and is given the power to sell and manage the same as though he were absolute owner. All this may be conceded if no claim is filed. But this Act did not repeal Section 9, * * *."

(Section 9 is the provision of the Act which authorized those whose property had been improperly seized to sue for it.) And then he continues:

> "* * * And as we have said, provides for immediate claim and suit and requires the property in cases of suit to be retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result. The present

> proceeding gives nothing but *the preliminary custody, such as would have been gained by seizure. It attaches the property to make sure that it is forthcoming if finally condemned, and does no more*" (pp. 22, 23; Italics ours).

In the majority opinion of the United States Circuit Court of Appeals for the Third Circuit in *United States* v. *Chemical Foundation, Inc.*, 5 Fed. (2d) 191, speaking of the amendment by the Act of Congress of March 28, 1918, to the Trading with the Enemy Act of October 6, 1917, it is said (at page 205):

> "It is evident that by this amendment Congress transformed the Trading with the Enemy Act from a purely conservation measure to one of action, definite and drastic. It no longer left the ultimate disposition of seized enemy property in suspense, but determined its disposition with finality. While it gave the Custodian the same custodial powers which it had previously vested in him, Congress gave him additional powers over seized enemy property to meet a war situation which had arisen since the date of the original enactment and to meet other war situations as they should arise in the future * * *."

The uniquely American and inequitable theory on which the immunity from judicial process of property actually being used for public purposes is based, is that incidental injury to private persons resulting from the normal exercise of a sovereign function should not be compensated for by the sovereign unless the injury constitutes a "taking" of property, or unless the legislative branch of the sovereign especially consents. But admit-

ting, for purposes of argument, all the facts suggested by the United States Attorney, the present case is not within that theory.

We are not asking the sovereign (excepting as a subsequent taker of property subject to our lien) to compensate us for the damage to our ship or cargo. Nor are we asking such compensation indirectly by asking for a seizure or sale of any property belonging to the sovereign at the time of the collision, or of any property which it had promised to keep free from liens or damage.

Immediately after the collision, the United States could have returned the *Antigone* to her German owner without compensating the owner for the physical damage suffered by her in the collision, and without first paying off our collision liens. The United States had never promised to return the *Antigone* to her German owner at the end of the war free from liens and free from physical injuries suffered from the negligence of servants employed by the United States to navigate the vessel. As custodian or receiver, the United States was not personally liable for such injuries or liens, but they created charges against the *Antigone* as the trust fund or asset of the receivership.

In *The Western Maid* cases, 257 U. S. 419, the United States owned absolutely one of the vessels, and by requisition charter parties had formally promised to return the other two vessels there involved at the end of the war, free from all liens and free from physical injuries suffered during the charter service.

In those cases the suits against the vessels were suits against the United States, because the United States would have to pay any decree.

In the present case, the United States (excepting as a subsequent taker of property subject to lien) will not have to pay any decree that may be entered. Here the decree would normally have been paid after public use of the vessel ended by her seizure and sale by an admiralty court. In substance, this would mean merely that the United States was at the end of the war returning the *Antigone* to her German owner, less the physical injuries and liens suffered by her during war service. The maritime lien for the damages to the *Gaelic Prince* follows and is regarded the same as the physical injuries suffered by the *Antigone* herself. This, of course, assumes that the servants navigating the *Antigone* are on the trial held negligent.

It is equitable that this should be so. Why should the damages incidental to the war service of the *Antigone* fall on innocent American and British cargo and shipowners, rather than on the private German owner and his vessel whose negligence caused the damages. The German sovereign, whose national owned the *Antigone* was causing the necessity for the war service of the *Antigone*, and she was used in resisting and minimizing the damages caused by Germany in plying between Europe and New York as she was normally operated before the war.

The maritime collision rules are the result of centuries of experience and are observed by vessels of all nations. The lien liability resulting from a violation of those rules is founded on the most equitable reasons and is designed to encourage careful navigation and to prevent the loss of life and property on other vessels. It is a serious thing for a court to exempt a vessel from the normal application of the maritime collision law and thus en-

courage carelessness and endanger lives and other vessels. Such exemption should be granted only to vessels in charge of officers commissioned by and responsible directly to the President (or at least to the Secretary of War or the Secretary of the Navy). Immunity should be denied to vessels whose injury or loss would not ultimately fall on the United States and whose masters and officers are uncommissioned and unenlisted employees whose only relation to the United States is one of private contract with an officer of the United States.

The *Western Maid* decision (257 U. S. 419), is supportable only on the theory stated by this Court, namely, that it was a suit against property owned by a sovereign and therefore was an effort indirectly to collect money from the sovereign personally. But that decision is inapplicable where, as here, the suit is not against the sovereign's property, but against enemy-owned property which the United States, although using it as licensee or custodian, had not promised to keep free from liens or damages.

The fact that the United States, after the collision, by the Peace Treaty, accepted a voluntary deed or grant of the *Antigone* from her German owner, obviously does not modify the theretofore-existing relationships between the United States and its own citizens.

The theory of the *Western Maid* decision would be applicable here only if the United States had, at the time of the collision, promised to pay compensation to the German owners of the seized ships; in other words, if the original seizure of the *Antigone* should be regarded by this Court as an actual "taking" or requisition of the *Antigone*, on promise to pay compensation. But as we

show later in this brief, the United States merely intended by the seizure to sequestrate the seized ships and use them as licensee or custodian without claiming any property interest in them, and without promising compensation.

Another alternative would be that the United States confiscated the *Antigone*. The lower Court in this case virtually held that this was done. But we do not believe that this Court will affirm the decision of the lower Court that this savored of confiscation, or that an Act of Congress in violation of international law is constitutional. This constitutional question was apparently reversed by the Court in *Müller* v. *United States*, 11 Wall. 268, 305, for future decision.

The authority of the civilian Lynch was limited to taking over *possession*. This is shown by the letter from one of the Shipping Board Commissioners purporting to define his authority to act for the President and the Shipping Board.

In the nature of things, Lynch could not have been given authority to take over any property interest. A property interest in or title to the *Antigone* could only be taken by a court proceeding to detain, requisition or condemn her.

No effort was ever made to follow up Lynch's seizure by a court proceeding or action of any officer of the United States toward acquiring a property interest of any kind in the *Antigone*.

If the President and the Shipping Board had authority to take a property interest in the *Antigone* they did not exercise it either directly or through any officers or employees of the United States.

The seizure by Lynch, therefore, had no greater legal result than a seizure by the Alien Property Custodian under the later Acts of Congress. But a seizure by the Alien Property Custodian would merely be a taking over of possession as custodian or receiver for the private enemy owners and would transfer no property interests in the thing seized to the United States. Nor, in the absence of gross malfeasance would such a seizure impose on the United States or the Alien Property Custodian any of the personal obligations which would ordinarily be imposed on a private person owning an interest in property.

An injury to the property after the seizure would be suffered not by the United States or the Custodian, but by the private owner.

Similarly, a maritime lien liability created by the admiralty law against the seized property would be suffered not by the United States or the Custodian, but by the private German owner. The United States was therefore not directly or indirectly through its property being asked to pay for the physical injury or the collision lien. The United States, therefore, is not immune and having taken the property with the lien should account to the injured party. The theory thus contended for is in accordance with repeated statements by our public men.

Senator Knox on June 30, 1921, said in the Senate (Cong. Rec., Vol. 61, p. 3397):

> "The language the Senator has in mind only has reference to the thing that has already been done by the Alien Property Custodian. The whole theory is this: Speaking for myself personally, I

hope the day is not far away when we shall come back to the traditions of the American people that the right upon land of private property belonging to an alien enemy is a sacred right; that such property may be taken into custody only for the purpose of conservation; and that at the end of a war there shall be a strict accounting to the owners of that property by the Government of the United States, which may take it temporarily into its possession. That is one of the principles for which this country has contended for a hundred years. While, as Chief Justice Marshall said, the Congress may have the power to provide that the private property of alien enemies may be taken during a war, it can only do so by putting upon itself a moral turpitude of which we ought to be ashamed.

The purpose of the joint resolution is simply to hold in *status quo* the things that have been done by the Alien Property Custodian. The joint resolution simply states that until a suitable adjustment has been made of the claims of American citizens against Germany for the property that has been seized by Germany, the property in the hands of the Alien Property Custodian shall be held until Congress shall dispose of it."

In the "Camillus Letters" (written about 1795) of Alexander Hamilton, it is said:

"XVIII. No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been confided to the faith of our Government and

laws, on account of controversies between nation and nation."

John Bassett Moore in his Digest of International Law, Vol. 7, page 308, says (italics ours):

> "Finally, without unnecessarily multiplying authorities on a point which is *undisputed*, we may quote from Hall the following passage:
>
> *'Property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, may be said to enjoy a practical immunity from confiscation.'"*

SECOND POINT.

The United States has failed to prove that the *Antigone* at the time when the collision occurred had a status which would prevent the ordinary maritime lien which arises from collision attaching to her.

When a collision occurs under the general maritime laws as enforced in our courts, a maritime lien arises against the negligent colliding vessel in favor of those damaged by the collision and the right to proceed *in rem* to enforce such lien is recognized universally by our courts.

The Palmyra, 12 Wheaton 1, 14;
United States v. *Brig Malek Adhel*, 2 How. 210, 233;
The John Frazer, 21 How. 184, 194;
The China, 7 Wall. 53;

The Merrimac, 14 Wall. 199;
The Clarita and The Clara, 23 Wall. 1;
Ralli v. *Troop*, 157 U. S. 386, 402, 403;
The John G. Stevens (1898), 170 U. S. 113, 120, 122;
Workman v. *The Mayor*, 179 U. S. 552, 572, 573;
The Barnstable, 181 U. S. 464, 467.

This maritime lien is a property right in the vessel herself. It is not a lien which depends in any manner on possession of the vessel by the lienor as might be supposed by any lawyer versed only in the common law.

Its nature was thus described by Mr. Justice Gray in delivering the opinion of this Court in *The John G. Stevens*, 170 U. S. 113, at page 118:

> "Accordingly, in our own law, it is well established that a maritime lien or privilege, constituting a present right of property in the ship, *jus in re*, to be afterwards enforced in admiralty by process *in rem*, arises, not only from a collision and for the damages caused thereby; *General Ins.* v. *Sherwood, The Rock Island Bridge, The Siren* and *The China*, above cited; but also for necessary supplies or repairs furnished to a vessel, whether under the general maritime law in a foreign port, or according to a local statute in her home port. *The Young Mechanic, The Kiersage, The Lottawanna, The J. E. Rumbell* and *The Glide*, above cited.
>
> Some years before the decision in *The Bold Bruceleugh*, Mr. Justice Story had recognized the

existence of a maritime lien, as well for damages by collision: *The Malek Adhel*, 2 How. 210, 234 * * *"

Again at page 120, he said:

"The foundation of the rule that collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, *by whomsoever owned or navigated*, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. This principle, as has been observed by careful text writers on both sides of the Atlantic, has been more clearly established, and more fully carried out, in this country than in England. Henry on Admiralty, sec. 75, note; Marsden on Collisions (3d ed.), 93."

At pages 122-123, he said:

"In *The China*, 7 Wall. 53, 68, by the application of the same principle, a ship was held liable for damages by collision through the negligence of a pilot whom she had been compelled by law to take on board; and Mr. Justice Swayne, in delivering judgment, said: 'The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or

by abandoning it to the creditors. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors.' 'According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosesoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings.'

The same principle has been recognized in other cases. *The John Fraser*, 21 How. 184, 194; *The Merrimac*, 14 Wall. 199; *The Clarita & The Clara*, 23 Wall. 1; *Ralli* v. *Troop*, 157 U. S. 386, 402, 403.

* * * * * * * *

That the maritime lien upon a vessel, for damages caused by her fault to another vessel, takes precedence of a maritime lien for supplies previously furnished to the offending vessel, is a reasonable inference, if not a necessary conclusion, from the decisions of this court, above referred to, the effect of which may be summed up as follows:

The collision, as soon as it takes place, creates, as security for the damages, a maritime lien or privilege, *jus in re*, a proprietary interest in the offending ship, and which, when enforced by admiralty process *in rem*, relates back to the time of the collision. The offending ship is considered as herself the wrongdoer, and as herself bound to make compensation for the wrong done. The owner of the injured vessel is entitled to proceed

> *in rem* against the offender, without regard to the question who may be her owners, or to the division, the nature or the extent of their interests in her. With the relations of the owners of those interests, as among themselves, the owner of the injured vessel has no concern. All the interests, existing at the time of the collision, in the offending vessel, whether by way of part-ownership, or mortgage, or bottomry bond or of other maritime lien for repairs or supplies, arising out of contract with the owner or agents of the vessel, are parts of the vessel herself, and as such are bound by and responsible for her wrongful acts. Any one who had furnished necessary supplies to the vessel before the collision, and had thereby acquired, under our law, a maritime lien or privilege in the vessel herself, was, as was said in *The Bold Buccleugh,* before cited, of the holder of an earlier bottomry bond, under the law of England, 'so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim.' 7 Moore P. C. 285" (170 U. S. 122-123).

This maritime lien, therefore, arises and is enforcible *in rem* if negligence is established on the part of the vessel sued, whether it is in the hands of pirates, as in the case of *United States* v. *Malek Adhel,* 2 How. 210, 233, or of a compulsory pilot, as in the case of *The China,* 7 Wall. 53, or of a demise charterer whose servants navigated the vessel, as in the case of *The Barnstable,* 181 U. S. 464.

The doctrine of the offending thing which has been so

thoroughly established in our law seems to have only one exception so far as this Court has determined, namely, when the United States has a property interest in the vessel or has promised to keep her free from liens, and the vessel is engaged in a public service.

The Western Maid, The Liberty, The Carolinian, 257 U. S. 419;

Also:

Ex Parte State of New York, No. 1, 256 U. S. 490;

Ex Parte State of New York, No. 2, 256 U. S. 503.

In the present case, the United States confessedly not only did not have title to the vessel, but did not have any property interest in her and had not promised to keep her free from liens, because:

1. No prize court proceedings had been had to subject her to forfeiture, and

2. The steps taken by the President, acting through the Shipping Board, at most only purported to go so far as to take possession of the vessel—if indeed they could have gone further without resort to judicial proceedings.

This is shown by the Letter of Instructions to Anthony V. Lynch, to take possession of the *Antigone*, together with his return thereon (R. 43, 44).

At the time of the collision on October 9, 1919, the vessel was still registered in the name of the North German Lloyd in Bremen and neither the United States nor any other Government had ever put the steamer through the prize court for the purpose of detention, seizure, con-

demnation or otherwise, *Stimming's Affidavit* (R. 55)..

These questions of immunity are, of course, technical questions and should be dealt with strictly. Otherwise the rights of innocent persons may be improperly foreclosed.

The burden of establishing the right of immunity was on the United States. *Judge Hough's Order* (R. 24).

It is clear that the vessel was not technically in the possession of the United States at the time of the collision, because, as shown by the affidavit of Frank H. Phipps (R. 45-36), she had been placed *out of commission* in the Navy and, though transferred to the Army Transport Service, was in possession of master, officers and crew who are not shown to have had any commissions from the President and, therefore, not to have been officers of the United States within the meaning of the Constitution.

Furthermore, whether the vessel was actually in the physical possession of the United States or not, it is perfectly certain that the United States had not secured by any proper proceedings the *right* to any possession, and that, therefore, the *Antigone* was not *rightfully* in the possession of the United States.

It would seem to be quite clear that if, for example, the vessel had proceeded to a port such as Rotterdam, Holland, or Christiana, Norway, neutral countries, it would have been possible for the North German Lloyd, in such a port, to have filed a libel for possession and to have secured as owner an adjudication delivering the vessel to it, as was done by this Court at the instance of an English owner when we were neutral in the case of *The Appam*, 243 N. S. 124, 153, 154, and cases there cited.

It seems to us, therefore, and, it is respectfully submitted, that the Government has wholly failed to put itself within the exception to the ordinary rule of liability *in rem* laid down by *The Western Maid*, 257 U. S. 419.

Furthermore, as was pointed out by Judge Hough, the proceedings taken by the United States in the Court below amounted to *independent proceedings*. It was in effect an informal proceeding in prize by which the United States submitted itself to the jurisdiction of the Court to have the status of the *Antigone* and its rights with regard to her determined.

It did not adduce proper evidence to establish its right or to fix the vessel's status.

In *Ex Parte Muir*, 254 U. S., 522, 532, this Court said:

> "*Prima facie* the District Court had jurisdiction of the suit and the vessel, *The Belgenland*, 114 U. S. 355, 368-369, and to call that jurisdiction in question was to assume the burden of showing what was in the way of its existence or exertion. Merely to allege that the vessel was in the public service and under the control of the British Government as an admiralty transport was not enough. These were matters which were not within the range of judicial notice and needed to be established in an appropriate way. They were not specially within the knowledge of the libelant, nor did it have any superior means of showing the real facts. Thus from every point of view it was incumbent on those who called the jurisdiction in question to produce whatever proof was needed to sustain their challenge."

The United States was not represented by officers of the United States in prosecuting its anomalous proceeding, and the whole proceeding failed to show anything more than that:

1. The steamship *Antigone* at the time of the collision was documented at Bremen as a privately owned German vessel, and that

2. Certain abortive proceedings had been taken by the Shipping Board which resulted in the vessel, through what *mesne* process is not shown, being in the possession of a crew sworn in the Transport Service but not appearing to have had any commissions from the President and hence not being officers of the United States, and that

3. The vessel herself was not commissioned in any way as a public vessel. In fact she had just been de-commissioned from the Navy. (*Phipps affidavit*, R. 46.)

Thus the independent proceedings instituted by the Government really failed to establish a basis of immunity, and the Judge below was wrong in dismissing the libels on account of those proceedings because:

> *The proof was entirely insufficient to show sovereign possession or public status of the Antigone.*
>
> 1. She had no commission or certificate as a vessel of the United States.
>
> 2. She was merely an empty vessel without cargo (excepting a few boxes of household effects) or passengers, without a commission or certificate, excepting her German certificate, and without any

officer on board holding a commission from the President or the Secretary of War or Navy.

3. She was merely a vessel designed for private German purposes, which might be of some use to the United States Army if she arrived at France and was re-conditioned but which on October 9, 1919, was not commissioned or certificated as a vessel of the United States, either public or private.

4. There is nothing in the proofs to indicate that the Army office at New York had anything to do with booking cargo, passengers or troops for her proposed voyage from France to New York, and there is no evidence regarding the time when it was intended that that voyage should begin.

5. There is no proof that at the time of the collision the United States had obligated itself to compensate the private German owner for any damages suffered by the *Antigone* or collision liens incurred by her during her war service.

The United States had not then assumed the marine or war risks and could have afterwards returned her to her German owner subject to collision liens and in a physically damaged condition without incurring any personal liability. (See *Michigan Law Review*, Vol. 20, p. 416).

6. It does not even appear that the *Antigone* was not, at the time of the collision, flying the German flag, which she was entitled to fly under her uncancelled German merchant vessel's certificate of registry.

7. It does appear that she was not documented as a vessel of the United States until May 31, 1921, long after the collision (R., 51, 52).

Furthermore, immunity is not claimed by the only officers authorized to claim it.

The claim is made by two "Special Assistants" to the United States Attorney at New York in the latter's name (R., 15-25). No claim is made by the President or the Secretary of War or the Secretary of the Navy. Immunity from the ordinary jurisdiction of the courts can only be claimed by a political officer who is authorized to represent that the matter involved is political and not justiciable and whose dignity is such that his word can be accepted by a court without proof. Obviously, two "Special Assistants" to the United States Attorney (R., 25), using the United States Attorney's name, are not such officers. Such "Special Assistants" are not even officers of the United States.

The Attorney General of the United States has not signed the claim, nor did he appear at either the trial before Judge Hough or the trial before Judge Hand.

Moreover, we respectfully submit that the Attorney General would not be the proper person to present such a claim because he is not a political officer (at least in so far as he appears in the courts), but is an officer whose duty it is to represent the Government in matters which are justiciable.

The claim or suggestion should properly be made by the Executive as was done in the case of *The Exchange*, 7 Cranch 116, supplemented by an offer of a certified copy of the commission of the vessel as a vessel of the United States at the time of the collision and the testimony of or a statement from her captain who is commissioned by the President as an officer of the United States.

On the Government's brief filed with Judge Hand there was, to be sure, added to the names of the Special Assistants to the United States Attorney the name of a "Special Assistant to the Attorney General" (R., 56), but as he was not an "officer of the United States," and as he did not sign the claim or suggestion, this would seem to be immaterial.

Having taken such an independent proceeding, in the nature of a Prize proceeding, we submit that the United States submitted itself to the jurisdiction of the Court within the principle of *United States* v. *The Norwegian Bark Thekla*, 266 U. S. 228, and *The Siren*, 7 Wall. 152.

The contention, therefore, of the appellants is that under the situation shown in the record the case should be reversed and remanded with instructions that the appraised value of the steamship *Antigone*, which was fixed in pursuance of the Resolution of May 12, 1917, at $424,264 (R. 48-49), should be deposited in court with interest, and that the third parties damaged by the collision should be entitled to participate in and to maintain their claims against the fund as in the case of *The Siren*, 7 Wall. 152, in accordance with their several priorities.

The United States must take the consequences of its failure to follow orderly procedure and have the *Antigone* condemned by a Prize Court if they wished to take title to her as was done by England in the case of *The Marie Leonhardt*, 1921 Probate, 1, or requisitioned by an order of the Prize Court, as was done in the case of *The Edna*, 3 British & Colonial Probate, 407, 420, or requisitioned

on deposit of an undertaking for payment on an appraisal, as was done in the case of *The Pellworm*, 15 Asp. Maritime Cases, 101, and *The Wilhelm Hemsoth*, 13 Asp. Maritime Cases, 115, or else have to have had an order of detention against the vessel from a Prize Court, as was done in the case of *The Chile*, L. R. 1914 Probate, 212, 215.

What the President should have done in connection with the *Antigone* in taking her over for military use is shown in a decision of this Court in the case of *The Pedro*, 175 U. S. 354.

In that case, it is said at pages 361, 362:

> "In due course proof *in preparatio*, which embraced the ship's papers and the depositions of her master and first officer, were taken. The master appeared in behalf of the owners and made claim to the vessel, and moved the Court for leave to take further proofs. * * *
>
> The motion was denied, the cause heard on the pleadings and proofs *in preparatio*, and a decree of condemnation entered. Subsequently the Secretary of the Navy elected to take the vessel for the use of the United States pursuant to Section 4624 of the Revised Statutes. By order of Court she was duly appraised and delivered to the Navy Department, and the amount of her appraised value deposited with the Assistant Treasurer of the United States at New York, subject to the order of the District Court. From the decree of condemnation an appeal was prosecuted to this Court."

The procedure that should have been followed by the President in the case at bar is also indicated in *The Rita,* 89 Fed. 763 (Dist. So. Car. 1898), where the Court said:

> "The Spanish steamship *Rita,* heretofore condemned as lawful prize of war, was taken for the use of the Government, after appraisement, in accordance with Section 4624 of the Revised Statutes, and the value thereof, $125,000 is subject to the order of the Court in this cause * * *. The proof shows that the *Rita* was an unarmed merchant vessel."

Inasmuch as none of the proceedings thus suggested were followed, the *Antigone* remained a privately owned German vessel and at the time of the collision, for the reasons above stated, was not commissioned as a public vessel of the United States nor technically in possession of officers of the United States, and hence open to collision liens.

The confirmation of the title of the *Antigone* in the United States which was effectuated subsequently by Treaty, merely means that after the collision the United States took the *Antigone* with the collision lien involved in this case attaching to her and forms the basis discussed in the next point of the right to maintain this action under the Suits in Admiralty Act.

THIRD POINT.

This suit if brought against the *Antigone in rem* immediately after the collision, whilst the *Antigone* retained the status she then occupied, could not have been regarded as a suit in which the United States or any of its property in effect was being sued.

If the United States did not stand exactly in the position of the Alien Property Custodian it did hold possession merely as a receiver for the German owner and like any other receiver was not personally liable for the negligence of navigating servants whom it had used due care to select.

In Tardy's Smith on Receivers, Second Edition, 1920, Volume L., pp. 245-248 it is said:

> "The liability of the receiver is generally merely in his official capacity unless the negligence or tort is the personal act of the receiver himself. In such event it is a charge against the receivership property.
>
> In other words, the damages resulting from the negligence of the agents or servants of a receiver are a charge upon the receivership estate of the character of operating expenses and are payable out of the net income or in case of a sale of the assets of the receivership out of the sale proceeds.
>
> The rule in this respect was stated in the following language in an early case: *Davis* v. *Duncan*, 19 Fed. 477. See also *Farmers Loan & T. Co.* v. *Central R. Co.*, 7 Fed. 537, 2 McCrary 181.

'A receiver, as such, upon principle and authority, is not personally liable for the torts of his employees. Were he so liable, few men would take the responsibility of such a trust; it is only when he himself commits the wrong, that he is held personally liable. The proceeding against him, as receiver, for the wrongs of his employees, is in the nature of a proceeding *in rem*, and renders the property in his hands, as such, liable for compensation for such injuries.'

While a court of chancery appointing a receiver will throw around him its shield of protection in all necessary cases, yet it can not be recognized as a defense to a suit at law for a breach of any obligation or duty which was fairly and voluntarily assumed by him as receiver, that he is an officer of court acting under a decree of a court of chancery. The obligations and duties which the receiver assumes are, in all cases, and like all other persons, to be measured by the nature and character of the business which he engages in. Thus it can not be contended that the receiver who is the mere custodian of property, answerable only for its safe keeping and due return when called upon for that purpose, occupies a similar position with like responsibilities to the receiver, who by virtue of his official position is placed in possession of, and is charged with the management and control of a railway where he by virtue of his undertaking assumes the functions of a common carrier, and where in his dealings he is constantly brought in contact with the public. In the latter case his responsibilities are largely increased. The very nature of the business carries with it extraordinary duties and corresponding liabilities, and

> hence it is that courts are more disposed to charge this class of receivers with a greater degree of responsibility, and recognize in the public, and those dealing with them, greater privileges and greater facilities for relief, not only in matters purely *ex contractu* but more especially in matters *ex delicto*. *Blumenthal* v. *Brainerd*, 38 Vt. 402, 91 Am. Dec. 349."

In Tardy's Smith on Receivers, Second Edition, 1920, Volume 2, pp. 1555-1556 it is said:

> "A ship which is being operated by a receiver is subject to the same liability for maritime liens as under ordinary circumstances."

The present case is very similar in many respects to the cases of *Texas & Pacific Railway* v. *Bloom*, 164 U. S. 636; *Texas & Pacific Railway* v. *Johnson*, 151 U. S. 81; and *Gray* v. *Grand Trunk Western Railroad Co.*, 156 Fed. 736 (certiorari denied 207 U. S. 594). In those cases actions at law were permitted to be maintained against the companies which had been under receivership after the receivership had ended to recover compensation for injuries suffered from the receiver's operations. This was permitted because the company at the end of the receivership had taken over all the assets of the receivership, including betterments without judicial sale.

As said by this Court in *Texas & Pacific Railway* v. *Bloom*, 164 U. S. 636, 639-640:

> "Undoubtedly, if this were a controversy between a party whose claim originated while a railroad was in the control of a receiver appointed during a foreclosure suit and a purchaser at a

judicial sale decreed under that proceeding, the plaintiff's proposition would be a sound one. If the property sequestrated had gone to sale and a fund had been thus realized for distribution, then, upon notice appropriate to proceedings *in rem*, such a claimant would, in the absence of special and unusual circumstances, have been bound by the disposition so made.

But the present case is one in which no judicial sale was made and no fund realized for distribution by final decree after notice to and a hearing of those having claims against the fund. It was not the ordinary case of a sale and purchase in which compliance with stipulated conditions forms part of the consideration, and in which the extent of the burdens assumed is defined. Here, the railroad and its appurtenances, whose value was largely enhanced during the pendency of the receivership, were returned to the possession of the railroad company; and while it was proper for the court, in order to protect its receiver, to make an order for those who had claims against him to bring them forward for disposition, it by no means follows that the company took back its property free from all claims that may have originated during the receivership. Such might be the case if the claim originated in some personal delinquency of the receiver, for which he and his bondsmen could be held responsible. But where the claim was incidental to the ordinary management of the railroad, not attributable to personal misconduct of the receiver, and where the court which had appointed the receiver had not been put in possession of a fund by a foreclosure sale, but had, at the request of the company and its mortgage creditors,

restored its property to the railroad company, while such a claim was pending, we are unable to concede that an order of this kind that was made in this case precluded the plaintiff from enforcing her claim."

In *Texas & Pacific Railway* v. *Johnson*, 151 U. S. 81, 101-102, this Court said:

"It is also urged, in repetition of the argument that judgment *in personam* could not be recovered, that this suit as against the railway company was necessarily a proceeding *in rem*, and could only be instituted and the property charged in the court having jurisdiction of the *res*. In other words, the contention assumes that all the property of the company after the discharge of the receiver was still under the protection of the Circuit Court of the United States for the Eastern District of Louisiana in respect of subjection to his and like claims.

We are of opinion that these views are inapplicable to the case. This action was in itself in no sense a proceeding *in rem*, and the state court has held on other than Federal grounds that the company was directly liable. The property was no longer in the custody of the Circuit Court, and it had no possession that would be interfered with by the levy of an execution, so that defendant in error was not obliged to resort to an intervention in that court before he could collect, unless he was personally bound to do so by force of an adjudication to that effect operating upon him. In this connection it should be observed that the property was not sold but merely redelivered to the company.

> No judgment *in rem* was entered; no fund existed through a sale in foreclosure; the earnings far exceeded the debts during the temporary management; and it did not appear that either in reference to expenses incurred in the administration or in the matter of claims resting on controverted priorities, or otherwise, there were any equities to be adjusted which required the further exercise of jurisdiction."

In *Gray* v. *Grand Trunk Western Railway Co.*, 156 Fed. 736, 743, the United States Circuit Court of Appeals for the Seventh Circuit said:

> "The defendant in error, as purchaser of the property and successor to the fund, having no part in the alleged tort, if chargeable for the damages, is chargeable alone through liability assumed in the purchase and circumstances of succession; and then only, under the facts averred, in conformity with the principles of equity, if governed by the general doctrines above referred to. In such aspect, however, the case is, as we believe, directly within and ruled by the decision of the Supreme Court in *Texas & Pacific Railway* v. *Bloom*, 164 U. S. 636, 643, supplementing the prior decision in *Texas & Pacific Railway* v. *Johnson*, 151 U. S. 81, 99."

In *McNulta* v. *Lochridge*, 141 U. S. 327, 331-332, this Court said:

> "His (a receiver's) position is somewhat analogous to that of a corporation sole, with respect to which it is held by the authorities that actions will lie by and against the actual incumbents of

such corporations for causes of action accruing under their *predecessors* in office. *Polk* v. *Plummer*, 2 Humphreys, 500; *Jansen* v. *Ostrander*, 1 Cower, 670. If actions were brought against the receivership generally or against the corporation by name, 'in the hands of,' or 'in the possession of,' a receiver without stating the name of the individual, it would more accurately represent the character or status of the defendant. So long as the property of the corporation remains in the custody of the court and is administered through the agency of a receiver, such receivership is continuous and uninterrupted until the court relinquishes its hold upon the property, though its *personnel* may be subject to repeated changes. Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasanaces, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands. As the right given by the statute to sue for the acts and transactions of the receivership is unlimited, we cannot say that it should be restricted to causes of action arising from the conduct of the receiver against whom the suit is brought, or his agents.

The defence is frivolous, and the judgment of the Supreme Court of Illinois must be affrmed."

FOURTH POINT.

This matter is justiciable and not political.

No question is raised regarding the right of the President under the Joint Resolution to *seize* the *Antigone*.

Nor is it suggested that any court proceeding was necessary *before* the seizure.

Nor is any question of the wisdom or expediency of the seizure raised.

The only questions are: Did the President seize the ship, and if so, what were the legal results arising from such seizure without subsequent prize court proceedings of any kind?

In the Government's brief in *United States* v. *Chemical Foundation* it is said:

> "The existence of a state of war or any other public emergency cannot and does not change the law or remove the limitations imposed by law upon the acts of officers or agencies of the Government in their relations to the Government or the people. To contend that the existence of an emergency would produce such a result would be to claim that such an emergency changed the nature of our Government from a government of laws to a government of men" (pp. 477-478).
>
> "It being thus made clear that all officers and agencies of the United States are officers and agencies of limited power in time of war as in time of peace and that these powers are conferred and limited by the Constitution and laws, it must of necessity follow that whenever the regularity of the exercise thereof (as distinguished from wisdom or expediency) is called into question and by a proper manner and by proper proceedings in a court of competent jurisdiction a 'case' is presented which that court must under the mandate of the Constitution adjudicate. Such issues are

and must always be 'justiciable' under our system of Government.

"Where it is a question of the existence or extent of the power it would seem that no question can ever arise as to the jurisdiction of the courts to determine the same. If these issues involve directly the construction and application of the Constitution and laws * * * it must be obvious that where Congress in exercise of its Constitutional functions confers upon an executive officer an executive power to be exercised when and as he may deem it wise, expedient or necessary to do so, then the exercise of that power to the extent authorized by law rests in his discretion and is based upon his sound judgment or opinion" (pp. 478-479).

"But a very different question is presented where the exercise of a power, the extent thereof, the limitations thereon and the legality of the exercise thereof, is raised. These questions may be raised in numerous ways. Existence of the power may be denied. It may be averred that the power granted has been exceeded. It may be claimed that the officer has proceeded upon a mistake of law and since the law is the grant and measure of his authority a 'taking' based upon a mistake of law is an unlawful act" (p. 480).

In the same brief, at page 217, it is said:

"Congress in providing for the seizure and sequestration of enemy property (which is all this act proposes to do as to the enemy) is dealing with the rights and interests of the enemy * * * Congress cannot confer upon the President or other executive officers legislative or judicial powers

even as to the seizure or sequestration of enemy property or the power to adjudicate a confiscation. It can only confer upon executive officers executive powers. The freedom from Constitutional limitations applies only as to the enemy and results from the disability of the enemy. It does not apply to acts of administration or internal affairs of the Government or between the Government and officers or agents of the Government and its citizens, although such acts may relate to property which prior to seizure had an enemy status. *Field* v. *Clark*, 143 U. S. 649; *Tillman* v. *Thompson*, 103 U. S. 168, 190; *U. S.* v. *Lee*, 106 U. S. 196; *Ex Parte Milligan*, 4 Wallace U. S. 113; *Brown* v. *U. S.*, 8 Cranch 110; *U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81; *Semmes* v. *U. S.*, 91 U. S. 21, 25, 26.

"When, however, the property has once been seized and sequestrated a different question arises. We are no longer dealing with the rights of enemy, but the rights and powers of the Government or its officers in dealing with this property as acts of internal administration. This is a matter of domestic concern between the Government and its officers and citizens which is as completely controlled by the Constitution and laws of the United States in time of war as in time of peace.

"This important distinction will be clarified by an analysis of the several conditions.

If Congress had provided not only for seizure of this property but also for the confiscation thereof then upon the confiscation being adjudicated (a judicial function), the title and complete beneficial interests would have vested in the United States as public property. *Miller* v. *U. S.*, 11 Wal-

lace 268; *Kirk* v. *Lynd*, 106 U. S. 315, 317; *Semmes* v. *U. S.*, 91 U. S. 21, 25, 26.

"But the Trading with the Enemy Act was not an act of confiscation * * * It was only an act of seizure and sequestration with power of sale or converting into its equivalent in cash, the same to be held pending final action by Congress * * * The power was thus vested in the executive officers to seize the property. This was dealing with enemy rights. Once it was seized, however, the dealing with enemy rights ended so far as executive officers were concerned."

FIFTH POINT.

This suit is brought against the United States not because of any relation it had to the *Antigone* at the time of the collision on October 9, 1919, but because

1. A maritime lien for collision arose at that time on the *Antigone*.

2. Because this lien is a property right, and

3. The United States has taken over title to the vessel under the treaty, subject to this property right of the appellants.

At the time of the collision the United States, being merely a custodian or receiver to conserve the *Antigone*, was not personally liable for the collision damage.

The collision, however, created a lien on the *Antigone* because her only ship's paper was a German merchant vessel register, and she is not shown to have been in the

possession of an officer of the United States as defined by the Constitution.*

After the collision the Peace Treaty with Germany, so to speak, ended the Receivership and the United States took over the vessel assets, including the *Antigone,* under the grant and confirmation made by Germany in the Treaty.

This suit was then brought against the United States under The Suits in Admiralty Act, as a substitute for a suit *in rem* against the *Antigone.*

This form of action was necessary because the Act provides that a maritime lien on a vessel which has afterwards been acquired by the United States must be brought not against the vessel, but against the United States, according to the principles of libels *in rem.*

The case is the same as if the United States were to take a parcel of real property subject to a mortgage, the right of the mortgagee not being taken. If the United States had not accepted the grant of the vessel contained in the Peace Treaty this suit would have been against the *Antigone in rem* and the private German owner would claim her either directly or through the United States as receiver or custodian.

Furthermore, it should be noted in this connection that as a lien was created on the steamship *Antigone,* if the United States, through Congress, eventually determines to return the steamship or to account for her value to the German owners, the United States will be in a position either to turn back the vessel subject to the lien or to deduct from the value of the vessel whatever amount may be recovered in this proceeding.

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*Article II, Section 2, of the Constitution provides:

"The President shall * * * appoint * * * all other officers of the United States whose appointments are not herein otherwise provided for."

The situation of the German owners of the vessel was that of involuntary bailors, similar to the position of the Southern Pacific Company *vis-a-vis* the Director General of Railroads, in the case of *Standard Oil Company of New Jersey* v. *Southern Pacific Company*, 268 U. S. 146.

In that case this Court held that for a damage done to a vessel in possession of the Director General, the owner had not any right to recover against the United States except on the basis of a contract of indemnity.

There is, of course, no such contract of indemnity with the German owners in this case and, consequently, whatever recovery may be had against the *Antigone* will not come out of the United States, but, as the United States does not claim to have confiscated the *Antigone*, will be borne ultimately by her German owners.

SIXTH POINT.

The relation of the United States to the *Antigone* at the time of the collision was substantially that of a licensee. In April, 1917, it sequestrated her and in May, 1917, asserted the privilege of using her as licensee or trustee without confiscating or promising to pay for her use. In other words, the United States never "took" any property interest in the *Antigone*.

The Court of Claims correctly decided in the cases brought by the German ship owners that the United States neither confiscated the legal right to possess or use the *Antigone*, nor requisitioned it on payment of compensation; and that the United States during the war was merely asserting a privilege or license to use the

seized vessels, the acquirement of any property right of possession or title awaiting Congressional action or a peace treaty at the end of the war.

Before the Peace Treaty with Germany, which was executed after this collision, the United States never claimed and did not have any property right or interest (whether right of possession, title or otherwise) in the *Antigone*.

All that the United States claimed in April, 1917, was a right to sequestrate, and in May, 1917, a license to use. While using the *Antigone* under this license the United States remained merely a custodian or agent for the enemy private owners, the legal right of possession remaining in such owners.

The marine and war risks to the vessel during such licensed operation were borne by the involuntary licensors, the private enemy owners. The risk and the duty of the United States during such operation were merely those of a licensee or custodian, namely, the use of reasonable care in the selection of competent servants to navigate the vessel.

The *Antigone* was interned and therefore useless to her German owner at the time she was sequestrated in April, 1917, and at the time in May, 1917, when the United States asserted the privilege of using her as licensee without assuming the operating risks of any duty as a legal possessor or owner.

Therefore, there was never any "taking" by the United States of any property right in the *Antigone* before the voluntary grant to the United States contained in the Peace Treaty.

Moreover, the license was exercised solely for the purpose of minimizing and resisting dangers and damages

which were being caused by the sovereign whose nationals owned the seized ships.

The United States never claimed or exercised before this collision any right to use the *Antigone* for any other purpose than this minimizing of war damages, nor for any purpose of profit or otherwise entitling the German owner to have the license regarded in equity as a "taking."

The fact that at the time of the collision the *Antigone* had no commission from the President as a vessel of the United States, and the fact that no person on board her had a commission from the President as an officer of the United States, shows that the United States was using the *Antigone* merely as a licensee or custodian without asserting any legal right of possession or other property right in her.

This is confirmed by comparison with the mere privilege as sequestrator and licensee asserted by the United States in holding and using through the Alien Property Custodian other enemy-owned private property such as the chemical patents.

As a licensee of the *Antigone* the United States was not bound to return her at the end of the war to her German owners free from collision liens or other injuries suffered by her from risks and dangers caused by the sovereign whose nationals owned her.

As the United States at the time of the collision had neither seized nor claimed a property interest in the *Antigone,* nor promised to compensate her owner for the collision liens suffered by her during this special operation, it cannot be said that this is a suit on a cause of action for which the United States would have been liable immediately after the collision.

Both the economic and legal loss because of this collision lien (and other physical injuries suffered in this collision) would have fallen at that time on the private German owners.

It was only by the Peace Treaty entered into after the collision that there was granted to the United States the legal right of possession and other property rights in the *Antigone* and, of course, the United States then took that *res* or property subject to this then-existing collision lien, as well as subject to the unrepaired physical injuries which the ship had suffered during her war service.

The Attorney General of the United States in an opinion to the Secretary of the Navy on October 28, 1924, relating to a proposed form of agreement granting a non-exclusive license to certain patents owned by the United States, said (Opinions of Atty. General, Vol. 34, page 320, at page 325):

> "A license does not accomplish an alienation as does an assignment. * * *
>
> "Nor is it a lease. * * *
>
> "Nor an easement. It merely gives a right to do an act for a specific purpose and is inherently revocable. An easement is irrevocable. * * * An easement implies an interest in the property, while a mere license does not. An easement may pass by grant; a license may not. * * *
>
> "The distinction has been frequently pointed out in opinions of my predecessors. See for example, 16 Op. 152; 21 Op. 473; 31 Op. 463, 466. * * *
>
> "When the law has been so construed by Government departments during a long period as to permit a certain course of action and Congress has not seen fit to intervene, the interpretation so

given is strongly persuasive of the existence of the power. There has been no prohibition by Congress so far as I am informed of the granting of licenses of the nature proposed. * * *

"Usages have been established in every department of the Government which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. * * *

"Attorney General Gregory, 30 Op. 470, 482, said: * * * 'It is perhaps not too much to say, in view of this acquiescence in the practice, that Congress has in a sense recognized that the authority to permit a reservation to be crossed by a road or to be used for a ferry landing or a bridge might on occasion be extended by analogy to authorize a similar temporary occupancy by a street railway track. * * * The inherent limitation upon it, namely, that the trespass authorized must sub serve some purpose, useful or beneficial to the Government itself, is one that goes to the mode of exercise rather than to the existence of the power. * * * It being clearly understood that such permission creates no right, interest or franchise in the license and that, however long continued the occupancy is subject in theory and fact to immediate termination at any time at the will of the Government. * * *

"The construction of the law as to the implied powers of the head of a department to grant revocable licenses for occupancy of land arising from long continued exercise of such power without intervention by Congress is adverted to in many opinions of my predecessors in addition to that just quoted from. 18 Op. 344, 348; 22 Op.

13, 27, 240, 245; 29 Op. 205, 207. See also *U. S. v. Midwest Oil Co.*, 236 U. S. 459; *Ozawa v. U. S.*, 260 U. S. 178, 197.

"The licenses discussed above relate to permits to use temporarily real property of the Government and show an implied power arising by construction from long continued exercise of the power without Congressional interference. * * *

"I can by no course of reasoning persuade myself that a power long exercised with approval with regard to the use of the real property of the Government may not be exercised in the same way and to the same extent with regard to the Government's patent property.

"I therefore, am of the opinion that you have power to grant the license proposed."

SEVENTH POINT.

If construed as a confiscation, the resolution of May 12th, 1917, is unconstitutional because it violates international law.

The question was apparently reserved by this Court in *Miller v. United States*, 11 Wallace (U. S.) 268, 305, for future decision.

International law provides that:

1. Enemy merchant vessels in a belligerent's port at the outbreak of war are immune from confiscation; and

2. Even when the merchant vessel is armed and the seizure is lawful, an application must be

made promptly after the seizure to a District Court of the United States on its Prize side for an order of detention or condemnation.

In *Hamilton* v. *Kentucky Distillers Co.*, 251 U. S. 146, 156, Mr. Justice Brandeis, delivering the opinion of this Court said:

> "The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations (*Ex parte Milligan*, 4 Wall. 2, 121-127; *Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312, 336; *U. S.* v. *Joint Traffic Assn.*, 171 U. S. 505, 571; *McCray* v. *U. S.*, 195 U. S. 27, 61; *U. S.* v. *Cress*, 243 U. S. 316, 326)."

In *Miller* v. *United States*, 11 Wallace (U. S.) 268, 305, this Court said:

> "It is argued that though there are no express Constitutional limitations upon the power of Congress to declare and prosecute war, or to make rules respecting captures on land and water, there are restrictions implied in the nature of the powers themselves. Hence it is said the power to prosecute war is only a power to prosecute it according to the law of nations, and a power to make rules respecting captures is a power to make such rules only as are within the laws of nations. Whether this is so or not we do not care to inquire, for it is not necessary to the present case."

Justice Field, in his dissenting opinion, said (11 Wallace 268):

> "The war powers of the Government have no express limitation in the Constitution, and the

only limitation to which their exercise is subject is the law of nations."

In "Progress and the Constitution," page 77, by Newton D. Baker, former Secretary of War, it is said:

> "The Constitution of the United States overrides treaties and laws alike, and the President and the Senate might inadvertently in any one of a hundred ways enter into engagements which would be beyond their Constitutional power * * *
>
> There are many things which the President with the concurrence of both Houses of Congress may not do, and countries which enter into treaties with us must realize at their peril that the Supreme Court is the final arbiter as to whether or not the powers granted to the Federal Government have been exerted in a particular case."

It is the unique and characteristic duty of this Court to act as a curb on the acts of the President and of Congress for the purpose of restraining them within the limits of the Constitution. See "The Constitution of the United States," page 225, by James M. Beck, former Solicitor General.

Charles E. Hughes, then Secretary of State, in an address delivered at Philadelphia on November 30, 1923, referring to Latin America, said:

> "States have duties as well as rights. Every State on being received into the family of nations accepts the obligations which are the essential conditions of international intercourse. Among these obligations is the duty of each State to respect the rights of citizens of other States which have

been acquired within its jurisdiction in accordance with its laws.

"A confiscatory policy strikes not only at the interests of particular individuals but at the foundations of international intercourse, for it is only on the basis of the security of property, validly possessed under the laws existing at the time of its acquisition, that the conduct of activities in helpful co-operation is possible.

"Each State may have its code of laws in accordance with its conception of domestic policy, but rights acquired under its laws by citizens of another State it is under an international obligation appropriately to recognize. It is the policy of the United States to support these fundamental principles."

At the Hearings of the House Committee on Merchant Marine and Fisheries, on December 15, 1920, with reference to the seized Steamer *Martha Washington*, the following colloquy took place between Mr. Chas. Evans Hughes and Mr. Hardy of the Committee:

"Mr. Hardy: * * * As I understand it, under international law, the private property, and justly so, of a private citizen of a country which may get into war with us, is really sacred.

Mr. Hughes: And ought to be."

In the brief of the Government in *United States v. Chemical Foundation*, 294 Fed. 300, it is said:

"* * * Confiscations of the private property of the enemy have met the universal disapprobation of the civilized world for nearly two hundred years" (p. 156).

"9. It is to be presumed that Congress, by the amendment of March 28 (to the Trading with the Enemy Act), did not intend to violate the 'law of nations' by authorizing confiscation of enemy property, unless the act clearly so directs" (p. 196).

"That public opinion of the civilized world has been against the confiscation of private property of the enemy in time of war for at least two centuries, up to the termination of the World War, is universally recognized" (p. 198).

"With the growth of Christianity, the practice of enslaving the defeated enemy gradually disappeared, but the practice of seizing his property continued. It early developed that the seizure must inure to the benefit, not of the individual members of the victorious army, but to the sovereign power of the nation. Then with the growth of commercial intercourse and with the progress of civilization, the idea that both the person and the property of the individual enemy was free from confiscation, although both might be arrested or impounded as a measure of safety during the war developed" (p. 202).

"* * * The policy of the United States and the modern policy of all civilized nations has forbidden the exercise of the power, which is admitted to exist in Congress, to confiscate alien property seized on land outside of the military zone in time of war" (p. 574).

In "Standards in International Law" in the Harvard Law Review, Vol. 34, page 777, it is said:

"In the field of international law the protection of national interests of substance on the one hand and of personality on the other calls for the ap-

plication of the same guiding principles in their recognition and delimination. Questions of the rights of nations over adjoining bodies of water, of what are territorial waters, of immunity of government owned property from judicial interference (for the American doctrine, see: *The Siren*, 7 Wall. (U. S.) 152 (1868); *The Davis*, 10 Wall. (U. S.) 15 (1869); *Stanley* v. *Schwalby*, 147 U. S. 508, 512, 515 (1893); *Johnson Lighterage Co.*, No. 24, 231 Fed. 365 (1916), and others), of international regulations of commerce, open a large field for the logical application of fixed rules in the interests of certainty, while the conduct of a nation in the society of nations raises much the same problem as the conduct of an individual in society in general. It can best be regulated with a view to some degree of individualization and consideration of circumstances, by means of standards, as, for example, the standard of reasonable action of civilized nations in the circumstances. * * * Judge Cardozo seeks the common element which pervades these precepts and sets up the standard that treaties are abrogated in the circumstances of war only in so far as and to the extent that 'their execution is incompatible with war'. (See 1 Kent Commentaries, 12th Edition, 176; Scott Resolutions of Institute of International Law, 172; Bluntschi, Le Droit International 'Codifie,' 5 ed. § 538). The clause of the treaty in issue, between the United States and Austria, gave reciprocal rights of inheritance to the subjects of each country in the lands of the other (See 9 Stat. at line 944). It was upheld as subsisting because to do so seemed 'most in keeping with the traditions of the law, the policy of the statute, the dictates of fair dealing, and the honor of the na-

> tion.' On principle, this standard, recognizing the duty of sovereign nations to live up to their contracts and excusing performance only where it is impossible, seems eminently sound and should gain a large following in the courts the world over. The liberality of such opinions as that of Judge Cardozo, must open the way to the ultimate effectiveness of international law."

Referring to the case of *Brown* v. *United States*, 8 Cranch. 110, which involved the question of the confiscability of private enemy property on land by judicial proceedings in the absence of Congressional authority, John Bassett Moore has said:

> "On the theory that war renders all property of the enemy liable to confiscation, Mr. Justice Story, with concurrence of one other member of the court, maintains that the Act of Congress declaring war, of itself, gave ample authority for the purpose. The majority held otherwise and Marshall delivered opinion referring to the practice of nations and the writings of publicists. He declared that according to 'the modern rule' tangible property belonging to an enemy and found in the country at the commencement of war ought not to be immediately confiscated; that 'this rule' seemed to be 'totally incompatible with the idea that war does of itself vest the property in the belligerent government'; and consequently that the declaration of war did not authorize the confiscation. Since such effect was thus given to the modern usage of nations, it was unnecessary to declare as he did in the course of his opinion that 'war gave to the sovereign full right to take the persons and confiscate the property of the

enemy wherever found,' and that 'mitigation of this rigid rule which humane and wise policy of modern times has introduced into practice' though that 'will more or less affect the exercise of this right' 'cannot impair the right itself.' Nor were the two declarations quite consistent. The supposition that usage may render unlawful the exercise of a right but cannot impair the right itself is at variance with sound theory. Between the effect of usage on rights and on the exercise of rights, the law draws no precise distinction. A right derived from custom acquires no immunibility or immunity from the fact that practices out of which it grew were ancient and barbarous. We may, therefore, ascribe the dictum in question to the influence of preconceptions and turn for the true theory of the law to the opinion of the great Judge delivered twenty years later in which he denied the right of the conqueror to confiscate private property on the ground that it would violate 'the modern usage of nations which has become a law.' *United States* v. *Prechemen,* 7 Peters 51." (Extract from address on "John Marshall," Political Science Quarterly XVI, 400, quoted in Moore's Digest of International Law, vol. 7, pp. 312 and 313.)

The American Delegation to the Second Hague Peace Conference, in its report to the Secretary of State of the United States, stated that the privilege enjoyed by enemy merchant vessels in port at the outbreak of hostilities "had acquired such international force as to place it in the category of obligations" (Foreign Relations, U. S., 1907, Vol. II, page 1158).

The modern tendency among civilized nations is to accord the same treatment to enemy ships tied up in the ports of a country on the outbreak of hostilities as to property on land. This attitude is reflected in Articles 1 and 2 of the Sixth Hague Convention (1907), which read as follows:

> "Article 1. When a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.
>
> The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.
>
> Article 2. A merchant ship unable owing to circumstances of force majeure, to leave the enemy port within the period contemplated in the above article or which was not allowed to leave, can not be confiscated.
>
> The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war or requisition it on payment of compensation."

It may be said that the reference to the Hague Conventions is not to the point because the American delegation did not sign this particular one. The refusal to sign, however, was based upon their view that the articles in question did not go far enough to express what

had already become an absolutely binding obligation so far as the United States was concerned. The report of the American delegation on this point is printed in full in Foreign Relations of the United States, 1907, at page 1158.

And, as the practice of governments serves to illustrate the conceptions of law which they hold, it may be useful to observe that neither at the outbreak of the war between the States nor at the outbreak of the Spanish War was any impediment offered to ships owned and registered in the Confederate States in the one case, or in Spain in the other, freely departing.

The power of this Court to enforce international law was granted by the Constitution and cannot be modified by the legislative or executive branches excepting by the execution of treaties or conventions.

As this Court said in *MacLeod* v. *United States*, 229 U. S. 416, 434, the Act of Congress must be construed "in the light of the purpose of the Government to act within the limitation of the principles of international law."

District Judge Hand in his opinion in the present case (R. 56), begged the question when he said "international law will be enforced in our courts, but not in the face of a Constitutional act of Congress."

The larger issue, of more momentous inquiry and far-reaching consequence, is not whether a statute pursuant to the war powers of Congress must be preferred above the rule of the law of nations, but whether an Act of Congress in derogation of the law and usage of nations and the treaties of the United States affirming its understandings, is constitutional if it operates to defeat

by confiscation the legal right of possession of aliens (though former enemies) guaranteed to them by treaty of the United States and its express contract aiming at perpetuity and consistent with international law.

Such a statute cannot be constitutional unless, consistently with the law of nations, it be read to imply an obligation on the part of the United States to make restitution or equitably to indemnify the injured individuals or the Government representing them.

Judge Hand, later, in his opinion, however, indicates a doubt whether the proposition as stated by him is correct, by falling back on the Treaty of Peace with Germany in August, 1921 (almost two years after the collision), commenting that it "would seem to confirm all Departmental orders regarding the transfer of German property" (R. 57), thus indicating that possibly something further than the acts of the legislative and executive branches was necessary to confirm the Government's tenure.

The eagerness of the Department of State, which became a matter of common knowledge, to conclude this treaty with Germany, is also strongly evidential of something further being requisite.

It is clear from Judge Hand's opinion that he did not regard the present case as governed by the theory of this Court in the *Western Maid,* 257 U. S. 419, which presupposes absolute title in the United States and which theory has been the subject of widespread dissent. See 56 American Law Review 770; 10 Cal. Law Review 333; 20 Michigan Law Review 533; 22 Columbia Law Review 589.

Even putting the question as Judge Hand stated it (R. 57), the fundamental inquiry should at least have

been whether as between the statute supplemented by the subsequent Treaty of Peace with Germany and the rule of international law calling for proceedings in Prize, "any other construction" remained, to quote Marshall in *The Charming Betsey,* 2 Cranch (U. S.) 64, 118, than that which warranted the Court in adjudicating that a statute alleged to be a violation of international law was paramount in obligation to it.

Assuming, for the purpose of argument, that Judge Hand was correct in stating that the treaty entered into after the collision and after the present suit was begun, was retroactive so as to extinguish the theretofore existing collision lien of the appellants, the fundamental and important issue still remains whether the Resolution of May 12, 1917, supplemented by the treaty with Germany in 1921, which are in conflict with the more fundamental modern usage of nations in respect to the immunity of private, non-combatant enemy property from confiscation, can be held to be constitutional.

The constitutionality of the Resolution must, we respectfully submit, be qualified, if not impeached, unless it be construed to imply ultimate restitution of these merchant ships or equitable indemnification therefor or reparation.

That this construction must enter into the statute and equally into the treaty appears to be beyond doubt; "as to such matters as were by the Constitution committed to the custody of the Federal Government, there were applicable thereto the law of nations, the maritime law, the principles of equity and the common law" (SHIRAS, *J.*, in *Murray* v. *Chicago Company,* 92 Fed. 868), at least as a principle of construction and interpretation.

The powers of Congress in peace and in war, as well as the treaty authority, respond to the law of nations "as understood in this country."

It is axiomatic that no single nation can change the law of nations adversely to its general moral, if not everywhere constitutional, obligation, an obligation by inherent limitation under the Federal Constitution of this country; and it is peculiarly the view of the common law that the municipal laws of a country cannot change international law (*The Scotia,* 14 Wall. 170, 187; *The Paquete Habana,* 175 U. S. 677, 711; *The Insular Cases: Downes* v. *Bidwell,* etc.).

The major question then turns upon judicial construction in a case of appropriate jurisdiction.

It is by a "superintending judicial authority," said Mr. Justice Wilson in *Chisholm* v. *Georgia*, 2 Dallas 419, 466, that the law of nations and the treaties of the United States will be enforced, and it is in this sense that the judicial power transcends "the ordinary legislative and executive powers of the general government, and the powers which concern treaties." Ibid, p. 425; Cooley Constitutional Law (3rd Edition), p. 123.

As Marshall (before becoming Chief Justice declared in Journal, House of Delegates, Virginia, January 22, 1799, p. 90) cases within the cognizance of the courts which arise under the Constitution "are triable by a rule which exists independent of any act of the Legislature or Union."

The present case, which arises under the law of the sea and of nations approved by the Constitution and affirmed by treaty of the United States, must be determined wholly by international law.

The Court will recall that Marshall, in the case of *Brown* v. *United States,* 8 Cranch 110, 129, held that the mitigations of the "rigid rule which the humane and wise policy of nations has introduced" (against confiscations of private property) "into the practice of nations, though they will more or less affect the exercise of this right, cannot impair the right itself."

But of this, John Bassett Moore, before his recent appointment as a Judge at the Hague, and while Professor of International Law at Columbia University, commented (in a note in Dillon: Marshall, Life, Character and Judicial Services, Vol. 1, p. 566):

"The supposition that usage may render unlawful the exercise of a right but cannot impair the right itself, is at variance with sound theory."

Marshall later abandoned his preconceptions and held in United States v. *Percheman,* 7 Peters U. S. 51 (see also the discussion in Dillon, *supra*), *"that the modern usage of nations which has become law," constrained the United States and its courts.*

Thus he holds that the Eighth Article of the Treaty of St. Ildefoso "must be intended to stipulate expressly for the security to private property, *which the laws and usages of nations without express stipulation would have conferred* • • •. The construction which we now give the article must enter into the construction of Acts of Congress upon the subject" (italics ours).

This doctrine, ultimately adopted by Marshall, applies to the immediate inquiry whether the securities afforded by the early Prussian treaties are of such character as to constrain the Federal Courts in the course of appropriate judicial proceedings to read into the construction of war

time acts of Congress and the Treaty of Peace their understandings.

Article XXIV of the Prussian Treaty of 1799, notably stipulates:

> "It is declared that neither the pretense that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceding article; but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature and of nations."

Article XXIII, touches and concerns the property of "merchants of either country, then residing in the other" and "in general, all others whose occupations are for the common subsistence and benefit of mankind."

But it is not necessary in the present case to rely on the Treaty with Prussia, because, as said repeatedly by this Court in the decisions already cited and in *Pollard v. Kibbe*, 14 Peters, U. S. 353, 402, *the principle of the security of private property sequestrated by conquest has been consecrated by "the usage of the civilized world."*

In this connection it is important to distinguish between the continuing obligation of treaties affirming new understandings of the law of nations and those which, in respect of legislative modification and repeal, are within *the power of Congress* (see 7 Minnesota Law Review, 113).

Hamilton writes: "Treaty stipulations which are designed to operate in case of war preserve their force and obligations when war takes place" (5 Hamilton's Works,

Lodge Edition, 126), and "our treaties and the law of nations form a part of the law of the land" (4 Hamilton's Works, Lodge Edition 146).

"An established rule of the law of nations can only be altered by agreements between *all* the civilized powers, or by a new usage, generally adopted and sanctioned by time" (5 Hamilton's Works, Lodge Edition, 218).

This Court, speaking through Chief Justice Marshall, in *Society, etc.*, v. *New Haven*, 8 Wheat. (U. S. 464-494), said:

> "We think that treaties stipulating for permanent rights and general arrangements and professing to aim at perpetuity and to deal with the case of war as of peace are at most only suspended while it lasts; and unless they are waived by the parties and new and repugnant stipulations are made, they revive in their operations at the return of peace."

"That treaties may amount to a law of nations follows from the definition of that law" (2 Madison's Works, 260, published by order of Congress).

If such be their nature, their legislative modification or repeal finds positive limitations, and this whether they be considered as repealing or affirming the general law, making exceptions to it, which are to constitute a particular law, or whether explanatory of the law of nations.

Judicial power and cognizance in the Federal Courts must on the one hand operate to constrain legislative enactment with respect to their modification or repeal, and, on the other, in case of appropriate jurisdiction, serve to

determine the constitutionality of the act of the Government in question.

Treaties stipulating for rights or establishing a usage consistent with the law and modern usage of nations and that those principles which lie at the foundation of our jurisprudence, if obligatory on the courts (Marshall, C. J. in *The Peggy*, 1 Cranch (U. S.) 103), cannot be less obligatory on the political branches of the Government, or, to say the least, upon an officer of the United States acting under a statute contravening their formal written understandings regarding the intent of the law of nations.

The early treaties between the United States and Prussia, assuring in effect the restitution, as well as the security of private enemy owned property upon the coming of peace, are therefore not only a recognition of a theretofore existing rule of international law, but are themselves a part of the international law which should be enforced by this Court.

It is significant that these early treaties with Prussia were regarded by the political branches of the United States as being so well settled a part of international law that it was not deemed necessary even to mention them in framing the more recent Treaty of Peace and Executive Agreement with Germany.

If, as the Government's claim in the present case alleges, the United States acquired by the seizure of the *Antigone*, a lawful right of possession, why was it necessary for this Government afterwards to have the German Government render that possession more valid by formal treaty?

Under the Treaty of Peace with Germany of August 25, 1921, the satisfaction of all private American claims

against Germany and the confirming to the United States "of seizures" imposed or made by the United States during the war, are the salient or expressed conditions upon which turn the retention of German property in the possession or control of the United States.

There is the further condition that by reference to the Treaty of Versailles, should these conditions not be fulfilled and confiscation ensue, Germany will indemnify her citizens pursuant to the understandings of that treaty; that this indemnification in practice has proven so far from equitable as to amount to confiscation.

"A right once vested does not require for its preservation the continued existence of the power by which it was acquired" (see 55 American Law Review 877).

The immunity under the treaties between the United States and Prussia of the *Antigone* and other merchant vessels in United States ports at the outbreak of war, from confiscation was within the protection of the Constitution and the law of nations as understood in this country and any treaty of the United States, law or executive authority must contemplate and recognize that immunity.

The *Antigone* was, therefore, at most in the *custodia legis* of the United States and could not in any real sense be said to be a vessel of the United States entitled to immunity from liability as an essential tool or part of the sovereign.

The resolution should, so far as the present case is concerned, be regarded as a confiscation because:

(a) If the resolution is ambiguous as to whether it is confiscation or requisition on pay-

ment of compensation the most favorable construction should be given to maritime lienors until the question of construction is finally determined by Congress, the President, or the Hague Tribunal.

(b) The resolution does not provide for compensation.

(c) The United States has waited eight years without promising or paying compensation or setting aside the appraised value as a tentative compensation fund.

(d) The treaty of Versailles, which was agreed to in this respect by the United States in the second article of its treaty with Germany in August, 1921, confiscates these ships to the Allies, thus interpreting the Resolution of May, 1917, as a confiscation.

(e) The United States Court of Claims, by refusing compensation, has virtually decided that the Resolution was a confiscation. An appeal has been taken to this Court from this refusal of the Court of Claims. This Court can, of course, take judicial notice of its own records showing this construction and refusal.

(f) The Secretary of State of the United States has not replied to or complied with the note of the German Ambassador delivered on August 12, 1925, demanding the return of all German private property (including the *Antigone* and other German merchant ships) seized in the United States during the war, on the ground that all claims of American nationals against Germany and German nationals have now been amply provided for by the Dawes Plan and the London Con-

ference. On inquiry by this Court, Secretary of State Kellogg will disclose the part of the note which is relevant to this case.

EIGHTH POINT.

The President did not seize or take over the possession of the *Antigone* after the adoption of the Resolution of May 12, 1917.

1. The uncontradicted evidence shows that the *Antigone* was seized "in April, 1917" (R. 55), a month before the adoption of the Resolution, by "certain persons purporting to represent the United States" (R. 55) "who came aboard the said steamer and took possession thereof and removed the master and crew, and that the master protested to said persons against the seizure of the ship" (R. 55).

The provisional half-hour of Lynch on board the *Antigone* on July 17, 1917, at Norfolk was clearly not a taking over of possession (R. 27).

Lynch testified:

"Question. How long altogether were you on board the *Neckar* (the *Antigone*)?

Answer. Not to exceed half an hour (R. 28).

Question. Did you leave the ship then?

Answer. I left the ship then.

Question. Returning to New York?

Answer. I am not quite clear whether I returned to New York or went on to Baltimore" (R. 28).

Lynch was not an officer of the United States. He held no commission from the President. Constitution U. S., Article 2, Section 2. He was merely a civilian appointee of one of the several commissioners of the United States Shipping Board. There was no proof that he was ever appointed an officer of the Shipping Board by a resolution of the Board or otherwise, nor that the majority of the Board authorized his appointment as an agent.

He was authorized only to "take possession" (R. 43) of the *Neckar*. Possession is physical control. Physical control of the *Antigone* was already in undisclosed persons and was not displaced by Lynch.

No officer of the Shipping Board was called or any documents offered to show that the majority of the commissioners of the Shipping Board had authorized the writing of the letter of July 14, 1917, by John A. Donald, Commissioner, to Lynch (R. 43). Lynch was to take possession "in the name of the United States Shipping Board" (R. 43), yet every paper offered by the United States Attorney indicates clearly that the Shipping Board never had possession of the *Antigone* before March 19, 1921 (R. 51), more than a year after the collision, at which time her first provisional register as a vessel of the United States was issued (R. 51).

Lynch was not an officer either of the United States or of the Shipping Board. Therefore, neither the President nor a Commissioner of the Board could delegate to him the authority conferred on the President by the Joint Resolution of May 12, 1917.

In *Burnap* v. *United States*, 252 U. S. 512, 514, 516, Mr. Justice Brandeis, delivering the opinion of this Court, said:

> "The Constitution (Art. II, Sec. 2) confers upon the President the power to nominate, and with the advice and consent of the Senate to appoint, certain officers named and all other officers established by law whose appointments are not otherwise therein provided for; but it authorizes Congress to vest the appointment of inferior officers either in the President alone, in the courts of law or in the heads of departments (6 Ops. Atty. Gen. 1) * * * The term head of a Department means, in this connection, the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet. It does not include heads of bureaus or lesser divisions. *United States* v. *Germaine*, 99 U. S. 508, 510. * * * The distinction between officer and employee in this connection does not rest upon differences in the qualifications necessary to fill the positions or in the character of the service to be performed. Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto."

In the Government's brief in *United States* v. *Chemical Foundation*, 5 Fed. (2nd) 191, it is said at page 254:

> "In no instance was the name of any person used but the performance of the duty or exercise of the power was required of the office. When it

came to dealing with this particular duty, however, the President seemed to realize that the power and discretion given was personal and he therefore undertook for the first time so far as we recall in the history of the Government to vest an important executive power and discretion of the President in a particular person as an individual and not as an officer or office. * * * The Court in its opinion (R. 49-30) entirely misapprehends the position of the Government on this point. It is there stated that the contention is based upon the failure of Mr. Polk to put the words 'counselor of the State Department' after his signature. The Government makes no such contention. It contends that the President had no authority under the act to delegate this power at all; that he certainly had no authority delegated to an individual as distinguished from an office or officer."

1. The perfunctory and momentary seizure in July, 1917, after the Resolution was adopted, was not a real taking of possession. There is no proof that the seizure in April, 1917, was by the President or by any one having authority from him.

2. The President was authorized "to take over the immediate possession and title" to the vessels.

The Resolution should be construed in the light of international law and of the other applicable Acts of Congress which were not inconsistent with the Resolution and were not repealed by it.

The Resolution assumes that the President will do the acts which are necessary under international and municipal law to constitute a taking of possession of such vessels in time of war. The claim alleges merely the performance of one act—seizure.

It does not allege performance of the other necessary acts of

(a) Applying to a Prize Court for approval of the seizure by an order of detention or requisition; or

(b) Issuing a commission or certificate to the vessel as a vessel of the United States.

3. The President did not deposit the appraised value of the *Antigone*. The Resolution should be construed as contemplating that the seizure would be followed by deposit of the vessel's appraised value with a district court or an Assistant Treasurer of the United States in accordance with the long-established municipal law and Acts of Congress relating to seizures.

In the Government's brief in *United States* v. *Chemical Foundation*, 5 Fed. (2nd) 191, at pages 62 and 63, it is said:

"In the absence of appropriate legislation, neither the executive nor the judicial branch of the Government, nor any officer or agent thereof, from the President on down, has any power or authority to seize, condemn, confiscate or otherwise dispose of such property.

It necessarily follows from this that when Congress does authorize any action by the executive with respect to such property, the power and authority thus granted is confined to the limits prescribed by Congress, and must be exercised in the manner thus directed. The suggestion made in this case that the President has any power or authority to deal with property of this character

under the so-called war powers of the President, as Commander in Chief of the Army, or under any direct constitutional power or authority, is wholly without warrant at law, and is expressly denied by the decisions of the Supreme Court. Whatever power or authority the President or any other officer may have as to such property must be found in some Act or Acts of Congress, and the President, as well as any other officers vested with any power or authority over enemy property, must act strictly in accordance with directions of Congress, subject to all of the limitations imposed by the express terms of the Acts, as well as the rules of law and equity applicable thereto."

NINTH POINT.

The District Court had no jurisdiction on its admiralty side to entertain the claim of the United States. The Court should therefore have granted the motion of the libellants to transfer the claim proceeding of the United States to the prize side and permit the collision libels to be proved as cross suits or intervening claims in that proceeding.

1. The only proof that is competent for an admiralty court to receive to show the present status of a vessel is

(a) a claim of immunity by the President or the Secretary of War or the Secretary of the Navy; or

(b) a copy of the President's or the Secretary of War's commission of the vessel as a vessel of

the United States, together with the testimony of or a claim or statement by the master of the vessel who is commissioned by the President as an officer of the United States (Constitution U. S., Article 2, Section 2).

The failure of the United States Attorney to present the claim in either of these ways and his reliance on a forceful seizure *jure belli* as a source of right of possession really made his claim an action to quiet or establish right or possession or to have the *Antigone* declared a prize of war. Such claim proceeding was not within the jurisdiction of the District Court on its admiralty side, but could be entertained on its prize side.

In *The Appam*, 243 Federal 230, 233 (S. D. & Y.), Circuit Judge Hough said (pp. 233 and 234):

"The captor's title was subject to the action of a competent prize court, and to that extent was inchoate. This ship and lading never got before a prize court. The captor's title and possession was forfeited, not for any violation of international law, but for an infraction of American law, and restitution decreed because of a violation of American neutrality * * * These cases (and others new and old) rest, however, on the assumption that what is before the court is a seizure *jure belli*, that the case is one of prize, and that consequently all incidental matters arising between the parties in interest, not only may be adjusted but must be adjusted in the prize court, whose jurisdiction is exclusive, once the fact of prize is established, which fact also must be there adjudicated. *The Siren*, 7 Wall. 162, 19 L. Ed. 129."

In *The Peterhoff*, 19 Fed. Cas. No. 11025 (Dist. Ct. S. D. New York) Judge Betts said (at pp. 356, 357):

"In matters of prizes held for adjudication, the tenure of the property seized is eminently qualified, provisional and destitute of absolute ownership. The captors, by the universal rule of the modern law of civilized nations, became only keepers of the arrested property, for the purpose of submitting it to judicial inquiry and judgment; *the question of its confiscability for violation of the laws of war preceding and overriding all other questions of title or possession by the captors. It would constitute an undeniable outrage on those laws for the government of the United States, through any of its departments, executive, judicial or military, to appropriate this prize or its proceeds, mero motu, without the preliminary of a legal scrutiny and condemnation, prosecuted in due form of legal procedure.* The distinction between the capture of property by a belligerent during the war waged on land, and a prize seizure, is as definitely marked in consequence and effect, as if the two had no common foundation of authority. 1 Kent, Comm. 101, 102, note 6; Halleck, Int. Law, c. 30, Sections 1, 4. When property is captured on land by a belligerent, the title passes and is vested so soon as the capture is complete, and the property then belongs absolutely to the sovereign. In regard to a prize taken at sea, the right of property is not changed by the seizure alone. The prize remains in the hands of the captor, lawfully sequestrated, under a species of trusteeship, awaiting a trial at law in the courts of the nation seizing it. While undergoing the processes of law necessary to ascertain its character, it is exempt from all power of

> the captors other than that of safe-keeping for the purposes of trial, and of determining its culpability. *Until the decree of the prize court has transferred the title of the prize to the capturing power, the lawful proprietorship continues with the original possessor, subject to no other use of appropriation by its occupant than that of safe-keeping under arrest, pending judicial proceedings seeking its forfeiture.*"

In *Sawyer* v. *Maine, etc., Insurance Co.* (12 Mass. 291) the question arose in an insurance case whether the decree of the Minister of Justice in Haiti, condemning the vessel for breach of blockade, was conclusive. It appeared that the master of the vessel, on entering Port au Prince, was seized and brought before the King, who informed him that he "wanted the provisions" contained in the cargo. The master objecting, he was carried before the "minister of justice so-called," who read him a sentence of condemnation of the vessel. The Court rejected the decree, observing (p. 295):

> "Waiving all question as to the character of the government, under which the seizure of the vessel and the decree of forfeiture took place, it certainly is essentially defective when attempted to be applied to this contract of insurance. For it does not appear that any libel was filed, and monition issued, any hearing had, or that any of those formalities had taken place, which are necessary to give a conclusive operation to decrees of foreign courts. For aught that appears from the copy of the proceedings before us, the forfeiture was decreed by mere arbitrary power, without any trial; and that some of the forms of jus-

tice, used in civilized countries, had been assumed, without any regard to the substantial requisites of a judicial inquiry."

See also the vigorous expression of the same principle by Justice Story in a case of attempted administrative forfeiture for a violation of the revenue laws (*Bradstreet* v. *Neptune Insurance Company*, 3 Sumner, 600).

It is now the accepted rule, both in international law and under our Constitution, that the condemnation, to be effective, must be by a judicial tribunal, and that no administrative substitute can take its place.

In *The Appam*, 243 U. S. 124, no rights of the captor with respect to the uncondemned prize was permitted to deter judicial inquiry whether the act bringing the vessel into the waters of the United States constituted a violation of American neutrality or prevent restitution when it was once determined that such conduct was to be so regarded. The Supreme Court of the United States held that the mere seizure or capture was not sufficient to transfer title or the right to permanent possession.

In *The Siren*, 22 Fed. Cases No. 12911 (District of Mass.), District Judge Lowell said (pp. 234 and 235):

> "The prize act of 1864, c. 174 (13 Stat. 306), treats the subject chiefly as it concerns naval captors, and *does not profess to deal with the subject of prize generally and fully. It cannot be doubted that there may be a seizing or taking jure belli of enemy property within the ebb and flow of the tide which is neither by public nor private*

armed ships, as for instance, by a direct surrender to civil officers, &c. The celebrated order in council in England, passed March 6, 1665-66, reported, among other places, in Hay & M. 50, which declares the right of the lord high admiral, mentions many instances of prize which are droits of the admiralty, such as 'enemy's ships and goods casually met at sea and seized by any vessel not commissioned,' &c. Now, in England, during the colonial period, these several droits of the admiralty were not prize to the captors, because the king's several grants to the takers of prizes made in each war as the occasion arose, and were subsequent in date to the general grant to the lord high admiral. So that the English cases are very numerous in which prizes are condemned to the admiral, or, in later times, to the king in his office of lord high admiral, and not to the captors. It may well be conceded that *the United States have succeeded to the rights in prize, both of the crown and of the lord high admiral,* and that Congress has the right to grant prize-money to whomsoever it pleases, without regard to these ancient distinctions. Still, in construing the prize acts, it is useful to recollect that by the English law the grants of prize-money had their well understood limitations, and that a condemnation in prize was not necessarily a condemnation to captors; and that there were prizes which were not granted to either the admiral or the captors, such as vessels voluntarily brought in on revolt by their own crews, and vessels seized in port before declaration of hostilities; so that there were three different kinds of condemnation,—to the king, to the admiral, and to the captors. I have no doubt that some of the same distinctions and limitations hold

good in this country today. *Whatever is prize of war by international law in the several countries which acknowledge that law is so here, and our prize acts do not undertake to limit or define the boundaries of prize or of prize jurisdiction.* Accordingly, I have held, in a case of cotton picked up at sea, that it was properly proceeded against as prize, and I have no doubt of the propriety of that decision. Seventy-eight Bales of Cotton (Case No. 12,679). It necessarily follows that there may be prize when there is no one who is a captor under this prize act. Thus, if a person or a vessel having no existing commission makes a prize, the condemnation goes to the United States. *The Dos Hermanos,* 10 Wheat. (23 U. S) 306. So if there be no captor at all, as of vessels voluntarily brought into port of their own crews, or driven in by stress of weather. The old grant of droits of the admiralty was of prizes of this character, but it did not include all of this kind; the distinction, therefore, is older than the grant of droits, and the principle remains good in our law, that there may be seizers or takers in a certain sense who are not entitled to prize-money as technical captors, *though the goods seized may be prize.*

Upon the best consideration I have been able to give the subject, my opinion is that the *Gladiolus* was not the captor of this prize within the true intent of our statute, nor was the fleet as a whole."

In affirming Judge Lowell's decision, the Supreme Court of the United States, in 13 Wall. 339, 393, said:

"The course pursued (by Judge Lowell) was eminently proper under the circumstances, and

according to the course of practice in proceedings in prize."

In *Oakes* v. *U. S.*, 174 U. S. 778, 786, 788, the Supreme Court (Gray) (at p. 782), said:

"While she (the *Eastport*) was lying under the bank of the Tennessee River near Cerro Gordo, and being converted into a gunboat for use in the Confederate service * * * was boarded under the fire of the enemy and captured by detachments of men from the United States gunboats.

By the law of nations, as recognized and administered in this country, when movable property in the hands of the enemy, used, or intended to be used, for hostile purposes, is captured by land forces, the title passes to the captors as soon as they have reduced the property to firm possession; but when such property is captured by naval forces, *a judicial decree of condemnation is usually necessary to complete the title of the captors.* 1 Kent Com. 102, 110; Halleck's International Law, c. 19, sec. 7; c. 30, sec. 4; *Kirk* v. *Lynd*, 106 U. S. 315, 317.

The Eastport, at the time of her capture by the forces of the United States, was in the hands of the Confederate forces, and was being transformed into a gunboat. * * * Although not yet in condition for hostile use, she was clearly intended for that use."

In *The Nassau*, 4 Wall (71 U. S.) 634, 640-642, Mr. Justice Davis, delivering the opinion of the Court, said:

"It is the practice with civilized nations, when a vessel is captured at sea as a prize of war, to bring her into some convenient port of the govern-

ment of the captor for adjudication. *The title is not transferred by the mere fact of capture,* but it is the duty of the captor to send his prize home, in order that a judicial inquiry may be instituted to determine whether the capture was lawful, and if so, to settle all intervening claims of property. Until there is a sentence of condemnation or restitution, the capture is held by the government in trust for those who, by the decree of the Court, may have the ultimate right to it.

But it is argued that the libel in this case was sustainable, because no libel in prize had been filed, and until this was done any one had the right to proceed against the vessel for a meritorious claim. If this were so, it would greatly lessen, with captors, the stimulus to activity so necessary in time of war, for they could never tell how many private actions they would have to defend before they could reap the fruits of their enterprise and valor. Sound policy, as well as the law of prize, therefore, requires that all demands against captured property must be adjusted in a prize court, and that the property arrested as prize shall not be attachable at the suit of private parties. If such parties have claims which, in their view, override the rights of captors, they must present them to the prize court for settlement.

The fact of capture determines the jurisdiction, and not the filing of a libel. When captured as prize of war the property is in the custody of the law, and remains there to await the decision of a prize court, and, if condemned, all claims to the property are by it adjusted. Any other rule would work great hardship to captors, and tend to cripple the operations of government during

time of war. Under the provisions of the Act of Congress for the better administration of the law of prize, it is directed that, whenever any property captured as a prize is brought into any district of the United States for adjudication, it shall be the duty of the prize commissioners to receive it and keep it, until by the proper process of the Court, it shall be placed in the custody of the marshal of the district.

When, therefore, in this case, the prize commissioners certified to the Court below that the prize steamer *Nassau* had arrived in the District of New York and was delivered into their hands, there was sufficient evidence before the Court that the vessel was claimed as prize of war, and in the jurisdiction of a prize court; and the motion to dismiss this libel, filed by private parties, was properly entertained and decided.

Whether a maritime lien, like the one in this case, is lost, when the property is captured *jure belli*, would have been a proper question for investigation and decision by the prize court that condemned the *Nassau*, and which the libellants, on presentation to the tribunal, could have had decided.

Not having done so, the question is not before this Court for review."

The remarks of the Court in *The Nassau*, respecting claims of third persons, refer to claims arising before capture. It is well settled, both here and in England, that such claims are wiped out by capture unless, in the discretion of the Court, justice requires that they be admitted (*The Nyanza*, 276 Fed. 415). The claims of the present libellants, however, arose after capture, and

are, in all respects, similar to the claim which was allowed by the Supreme Court in *The Siren*, 7 Wallace 152.

This is not only a rule of international law, but a principle confirmed by the Constitution of the United States. In *Jecker* v. *Montgomery*, 13 How. 498, it appeared that a vessel captured by naval forces for blockade running during the Mexican War, was brought into the occupied port of Monterey, and there, together with her cargo, "condemned as prize" by the chaplain of one of the war vessels, whom the American military commander, with the President's approval, had appointed "Alcalde of Monterey," and authorized to exercise admiralty jurisdiction in cases of capture. More than a year later claimants of the cargo filed a libel *in personam* against the captor, attacking the validity of the Monterey decree. A demurrer to the libel was overruled by the Circuit Court, and on appeal to the Supreme Court, the decision was affirmed. Chief Justice Taney, delivering the opinion of the Court, said (p. 515):

> "All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And *under the Constitution of the United States the judicial power of the general government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish.* Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws

of the United States. And *neither the President nor any military officer can establish a court* in a conquered country, and authorize it *to decide upon the rights of the United States,* or of individuals *in prize cases, nor to administer the laws of nations.*

The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize. And the sentence of condemnation in the Court at Monterey is a nullity, and can have no effect upon the rights of any party."

In *The Resolution*, 2 Dallas (U. S.), 1, 2, 3, 4, 5, the Supreme Court said:

"Not an instance has been produced, where a capture, not authorized by the rights of war, has been held to change the property; but many authorities have been brought to show, that no change is effected by such capture. To say, that a capture, which is out of the sanction and protection of the rights of war, can nevertheless derive a validity from the rights of war, is surely a contradiction in terms.

But it is said, 'the fact cannot be ascertained, that the capture in this case was not authorized

by the rights of war; for it depends upon the will of the sovereign, whether an outrage, and capture *supra altum mare*, by his subjects of the property of subjects of another nation, shall be an illegal and piratical act, or an act of hostility; that the sovereign is not obliged to promulgate his will, at the moment he makes war, and that as the human will has no physical exsitence, it cannot be ascertained, but by a declaration of it by the sovereign himself, and therefore, *non constat*, but that the capture in the present case, was authorized by the British Crown and so a fair act of hostility, authorized by the rights of war.'

This argument is ingenious and plausible but not solid.

But, suppose, the term prize merely imported a capture, without any reference to its legality, and that it was the spirit and intention of the ordinance, to subject to prize all captures, both legal and illegal, after twenty-four hours; it does not follow, that it would affect the present case. *The municipal laws of a country cannot change the law of nations*, so as to bind the subjects of another nation.

The legality of a capture is open for question and examination, until a competent jurisdiction has decided the question, and a decree passes for condemnation as prize: then, and not before, all further questions and examinations are precluded; then, all parties, and all foreign courts, are estopped to say 'the capture is not legal'; and if the decree be erroneous or iniquitous, the party injured must apply for redress to that nation, whose courts have committed the error or iniquity."

In *Young* v. *United States*, 97 U. S. 39, 60, the Supreme Court said:

> "The rightful capture of movable property on land transfers the title to the government of the captor as soon as the capture is complete, and it is complete when reduced to 'firm possession.' There is no necessity for judicial condemnation. In this respect, captures on land differ from those on sea."

The necessity after seizure of a deposit of value or a judicial condemnation, as a condition to the taking over by the Executive of an enemy vessel for military purposes is still more evident on consideration of the decisions of the Supreme Court of the United States holding that vessels such as the *Neckar* are entitled to most liberal treatment and that a non-combatant enemy has a right not only to a judicial hearing and to appear and claim the seized vessel and contest the seizor's claims, but also to prosecute an appeal to the Supreme Court if the lower court's ruling should be unfavorable.

See *The Pedro*, 175 U. S. 354 (quoted at p. 76 of this brief).

The "day in court" required by international law was also given in *The Guido*, 175 U. S. 383 (1899), where the Supreme Court said:

> "She was there (at Key West) libelled and proofs *in preparatio* were taken. The master appeared on behalf of the owner (a Spanish corporation) and asserted claim to the vessel, and moved for leave to take further proofs in respect

of matters set forth in his test affidavit therewith filed, which motion was denied."

The same "day in court" was also given in *The Buena Ventura*, 175 U. S. 384, where it was said (at p. 385):

> "The vessel * * * was condemned upon the answers, given by the master and mate of the steamship, to standing interrogatories *in praeparatio*, and upon the documents seized on board the ship by the captors. * * *
>
> She made no resistance at the time of her capture, there were no naval or military officers on board of her, and she carried no arms or munitions of war. * * * In the test affidavit of the master he swore that at all times before the ship's seizure he and all of his officers were ignorant that war existed between Spain and the United States, and the vessel at the time of her capture was following the ordinary course of her voyage. * * * After a hearing the District Court on the 27th of May, 1898, condemned the vessel, 87 Fed. Rep. 927, which was sold under the final decree of the court, and her proceeds deposited to abide the event of an appeal, which was taken on the part of the claimant."

The Supreme Court said (at pp. 387 and 388):

> "She (the *Buena Ventura*) was captured as lawful prize of war, of the existence of which, up to the moment of capture, all her officers were ignorant. She was not violating any blockade, carried neither contraband of war nor any officer in the military or naval service of the enemy, nor any dispatch of or to the Spanish Government and attempted no resistance when captured.

> *The facts regarding this vessel place her within that class which this Government has always desired to treat with great liberality.* It is, as we think, historically accurate to say that the Government has always been, in its views, among the most advanced of the Governments of the world in favor of mitigating, as to all non-combatants, the hardships and horrors of war. To accomplish that object it has always advocated those rules which would in most cases do away with the right to capture the private property of an enemy on the high seas. 3 Wharton's International Law Digest, sec. 342. The refusal of this Government to agree to the Declaration of Paris was founded in part upon the refusal of the other Governments to agree to the proposition exempting private property, not contraband, from capture upon the sea."

Speaking in that case of the Executive Proclamation issued at the outbreak of war regarding enemy merchant vessels, the Supreme Court said (at p. 388):

> "It is necessary when his proclamation has been issued which lays down rules for treatment of merchant vessels, to put upon the words therein used the most liberal and extensive interpretation of which they are capable."

The same "day in court" to the private enemy owner was granted in *The Panama*, 176 U. S. 535. In that case, the seized vessel was owned by an enemy corporation. The Supreme Court said (at p. 536):

> "This was a libel for the condemnation of the steamship *Panama* as prize of war, and was heard in the District Court upon the libel, the

claim of the master in behalf of the owner of the vessel, and the depositions *in preparatio* of her master, her super-cargo and her chief engineer, which showed * * * She had no military or naval officer on board, made no resistance to the capture, and delivered all her papers and mails to the prize master. There were mounted on board the *Panama*, at the time of her capture, five guns. * * *

The master of the *Panama* moved the Court to allow further proof. * * * The District Court denied the motion of the master to take further proof * * * and extend a final decree of condemnation. * * * The Court also, on the application of the commodore commanding at Key West, and on the recommendation of the prize commissioners, ordered all the mounted guns and the ammunition therefor to be appraised by two officers of the Navy, and delivered to the commodore for the use of the Navy Department. The master of the *Panama* appealed to this Court from the decree condemning the vessel. * * *

That case (the *Buena Ventura*) would be decisive of this one, but for the mails and the arms carried by the *Panama*."

Because of the guns on the *Panama* the Court believed that she would be "employed as an auxiliary cruiser of the enemy's navy, in the war with this country" and therefore affirmed the decree of condemnation.

The same right of appeal by the enemy owner was recognized in *The Paquete Habana*, 175 U. S. 677.

That the general prize law requires a judicial hearing of the enemy owner, or of the master as his agent

and claimant, as a condition to the transfer by a prize court to the seizing sovereign of lawful possession for military use, is also shown by the following decisions:

The Thalia, 2 Rus. & Jap. P. C. 116;
The Lesnik, 2 R. & J. P. C. 92;
The Ekaterinoslav, 2 R. & J. P. C. 1;
The Mukden, 2 R. & J. P. C. 12;
The Kotik, 2 R. & J. P. C. 96;
The Ord, 2 R. & J. P. C. 354;
The Rossia, 2 R. & J. P. C. 39;
The Argun, 2 R. & J. P. C. 42;
The Manchuria, 2 R. & J. P. C. 52, and
The Tátarles, 1 R. & J. P. C. 166.

Indeed, the rule of law requiring a judicial proceeding as a condition to the transfer of possession to the soverign, is so well settled that the Navy Department has recognized it by general orders.

In *The Santo Domingo*, 119 Fed. 388 (E. D. N. Y.), the Court quotes Section 24 of General Order No. 492 of the Navy Department of the United States as follows:

> "24. The title to property seized as prize changes only by the decision rendered by the prize court. But, if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court."

The Court then says (at p. 389):

> "This order is intended to interpret the statutes for the guidance of the captors. It provides

for four alternatives: (1) sending the prize to the nearest home port; (2) converting it to public use in the case of need; (3) selling it if it may not be sent in for reasons indicated (unseaworthiness, existence of infectious disease, or lack of prize crew); (4) destroying it if it cannot be sold or there be imminent danger of recapture. One of the courses the captor must adopt."

And the Court holds (at p. 390) that

"The destruction of a lawful prize at the instance of the commander of the captors, by reason of the imminent danger of recapture, is not such an appropriation of the property for the use of the government as constrains the United States to deposit the value thereof for distribution, and entitles the captors to share therein.

This conclusion is based on the following findings:

(1) The statute contemplates that the captured property, or the proceeds, if sold, shall be brought to the proper port, unless it be destroyed or appropriated to the use of the Government before such delivery, and in case of appropriation before or after delivery, the value of the property shall be deposited by the Government for disposition. Adjudication as to the legality of the capture and award of prize money in a proper case are required when the vessel is brought in, sold, or appropriated, but adjudication only as to lawful prize as distinguished from award of bounty money when the property has been destroyed."

In 188 U. S., at pages 259 and 263, are quoted sections 23 and 24 of the "Instructions to Blockading Vessels and Cruisers," issued by General Order of the Secretary of the Navy on June 20, 1898:

> "23. As to the delivery of the prize to the judicial authority, consult sections 4615, 4616 and 4617, Revised Statutes of 1878 (Exhibit B). The papers, including the log book of the prize, are deliverable to the prize commissioners; the witnesses; and the prize itself remains in the custody of the prize master until the Court issues process directing one of its own officers to take charge.
>
> 24. The title to property seized as prize changes only by the decision rendered by the prize court. But, if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court."

If it should be suggested that the law of maritime or prize seizure is confined to seizures on the high seas, such suggestion is refuted not only by the British authorities above quoted, but also by the following American cases:

In *The Joseph*, 8 Cranch, 451, 455, the Supreme Court said:

> "Another objection relied upon is that this vessel was captured within the territorial limits of the United States. The fact upon which this objection is raised is not clearly established one way or the other. But admit it to be as contended

for by the claimants, the law is nevertheless against them. * * * *All captures as prize of war may lawfully be made within the territorial limits of the United States at any place below low water mark.* In admiralty; 14 Court of Claims 48."

In *The Caledonian*, 4 Wheaton (17 U. S.), Mr. Justice Story, delivering the opinion of the Supreme Court, said (at pp. 100-103):

"This is the case of an American ship, which sailed from Charleston, South Carolina, with a cargo of rice, bound to Lisbon, about the 28th of May, 1813, under the protection of a British license. In the course of the voyage, the ship was captured by a British frigate, and sent into Bermuda for adjudication. Upon trial, she was acquitted, and her cargo being prohibited from exportation, was afterwards sold by the agent of the claimant at Bermuda, and the proceeds were remitted for his use. The ship sailed from Bermuda for the United States, in November, 1813, and upon her arrival *at Newport, in Rhode Island, was seized by the collector of that port*, as forfeited to the United States. The libel contains four articles propounding the clauses of forfeiture: first, for the ship's having on board and using a British license; secondly, for the ship's being engaged in trade with the enemy; and, thirdly and fourthly, for using a British license, contrary to the act of congress of the 2nd of August, 1813, ch. 56, prohibiting the use of British licenses.

It is unnecessary to consider the last two articles, which are founded upon statute of prohibitions, because it is clear, that the two preceding articles, founded on the general law of

prize, *are sufficient to justify a condemnation jure belli,* the proof of the facts being most clearly established.

The only questions which can arise in the case, are, whether the ship was liable to seizure for the asserted forfeiture, *after her arrival in port;* and, if so, *whether the collector had authority to make the seizure. And we are clearly of opinion, in favor of the United States, on both points. It is not necessary, to enable the government to enforce condemnation in this case, that there should be a capture on the high seas.* By the general law of war, every American ship, sailing under the pass or license of the enemy, or trading with the enemy, is deemed to be an enemy's ship, and forfeited as prize. If captured on the high seas, by a commissioned vessel, the property may be condemned to the captors, as enemy's property; if captured by an uncommissioned ship, the capture is still valid, and the property must be condemned to the United States. But the right of the government to the forfeiture, is not founded on the capture; it arises from its general authority to seize all enemies' property, coming into our ports, during war; and also from its authority to enforce a foreiture against its own citizens, whenever the property comes within its reach. If, indeed, the mere arrival in port would purge away the forfeiture, it would afford the utmost impunity to persons engaged in illegal traffic, during war, for in most instances, the government would have no means of ascertaining the offense, until after such arrival.

In respect to the other point, it is a general rule, that any person may seize any property for-

> feited to the use of the government, either by the municipal law, or by the law of prize, for the purpose of enforcing the forfeiture. And it depends upon the government itself, whether it will act upon the seizure. If it adopts the acts of the party, and proceeds to enforce the forfeiture by legal process, this is a sufficient recognition and confirmation of the seizure, and is of equal validity in law, with an original authority given to the party to make the seizure. The confirmation acts retroactively, and is equivalent to a command."

Such suggestion that a prize seizure must be made on the high seas is also refuted by the following cases, which deal with seizures in enemy ports:

In *Dewey* v. *United States,* 178 U. S. 510, seizures of enemy public vessels (Spanish men-of-war) in Manila Bay (enemy territory) were held proper and prize money awarded.

In *The Santo Domingo,* 119 Fed. 386 (E. D. N. Y.), a Spanish armed vessel was seized as prize "while stranded on the cost of Cuba."

In *United States* v. *Steever,* 113 U. S. 747, a seizure of an enemy public vessel (the rebel iron-clad *Albemarle* "at Plymouth in the Roanoke River in the State of North Corolina," was held proper and prize money awarded.

At page 753, the Court said:

> "Prize money is, strictly speaking, a matter of bounty and not of right, and no one has any absolute title to it before adjudication."

A typical case showing the judicial method the President should have followed in "taking over" possession of *The Neckar* for military use is outlined in *The Pedro*, 175 U. S. 354. There an enemy merchant vessel was seized and a libel filed against her for condemnation as prize. At pages 361 and 362 it is said:

> "In due course proofs *in preparatio*, which embraced the ship's papers and the depositions of her master and first officer, were taken. The master appeared in behalf of the owners and made claim to the vessel, and moved the Court for leave to take further proofs. * * *
>
> The motion was denied, the cause heard on the pleadings and proofs *in preparatio*, and a decree of condemnation entered. Subsequently the Secretary of the Navy elected to take the vessel for the use of the United States pursuant to section 4624 of the Revised Statutes. By order of Court she was duly appraised and delivered to the Navy Department, and the amount of her appraised value deposited with the Assistant Treasurer of the United States at New York, subject to the order of the District Court. From the decree of condemnation an appeal was prosecuted to this Court."

The procedure that should have been followed by the Executive in the case at bar is also indicated in *The Rita*, 89 Fed. 763 (Dist. So. Car. 1898), where the Court said:

> "The Spanish steamship *Rita*, heretofore condemned as lawful prize of war, was taken for the use of the government, after appraisement, in accordance with Section 4624 of the Revised Stat-

> utes, and the value thereof, $125,000 is subject to the order of the Court in this cause * * * The proof shows that the *Rita* was an unarmed merchant vessel."

This is not only a rule of international law, but a principle confirmed by the Constitution of the United States. In *Jecker* v. *Montgomery*, 13 How. 498, it appeared that a vessel captured by naval forces for blockade running during the Mexican War, was brought into the occupied port of Monterey, and there, together with his cargo, "condemned as prize" by the chaplain of one of the war vessels, whom the American military commander, with the President's approval, had appointed "Alcalde of Monterey," and authorized to exercise admiralty jurisdiction in cases of capture. More than a year later claimants of the cargo filed a libel *in personam* against the captor, attacking the validity of the Monterey decree. A demurrer to the libel was overruled by the Circuit Court, and on appeal to the Supreme Court, the decision was affirmed. Chief Justice Taney, delivering the opinion of the court, said (p. 515):

> "All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And under the Constitution of the United States the judicial power of the general government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority

from the Constitution or the laws of the United States. And *neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States,* or of individuals in prize cases, nor to administer the laws of nations.

The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize. And the sentence of condemnation in the court at Monterey is a nullity, and can have no effect upon the rights of any party."

Lord Stowell put the matter forcibly in *The Flad Oyen,* 1 C. Rob. 114, where a British vessel captured by a French privateer was condemned as prize by a French consul at Bergen:

"It has frequently been said that it is the peculiar doctrine of the law of England to require a sentence of condemnation, as necessary to transfer the property of prize; and that according to the practice of some nations twenty-four hours, and according to the practice of others, bringing *infra presidia,* is authority to convert the prize. I take that to be not quite correct; for I apprehend that by the general practice of the law of nations, a

sentence of condemnation is at present deemed generally necessary; and that a neutral purchaser in Europe during war, does look to the legal sentence of condemnation as one of the title deeds of the ship, if he buys a prize vessel."

And he concludes:

"It is my duty not to admit, that because one nation has thought proper to depart from the common usage of the world, and to meet the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution; merely because general theory might give it a degree of countenance, independent of all practice from the earliest history of mankind. The institution must confrom to the text law, and likewise to the constant usage upon the matter, and when I am told that before the present war, no sentence of this kind has ever been produced in the annals of mankind; and that it is produced by one nation only in this war; I require nothing more to satisfy me that it is the duty of this court to reject such a sentence as inadmissible."

In Moore's Digest, International Law, Vol. VII, p. 630, it is said:

"The capture of the property having been made on the high seas, and no prize court having inquired into the authority of the captor, or the liability of the property under the public law to be seized, that act might in strictness be regarded as piratical in its character. By the maritime law of nations universally and immemorially received, there is an established method of determination,

whether the capture be or be not lawful prize. Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation had thereon as prize in a court of admiralty, judging by the law of nations and treaties."

TENTH POINT.

The Resolution is unconstitutional because it reduces the extent of the constitutional grant of admiralty jurisdiction to the judiciary and impairs the substantive international maritime law.

1. If construed as the United States Attorney suggests, the Resolution legislates against enemy-owned vessels as a class in an attempt to exempt them from the ordinary liabilities of privately owned vessels even though Congress intended not to assert any property right in them but merely to act as operating receiver for the enemy owners. By attempting to oust the admiralty courts of jurisdiction over a great multitude of vessels already within the admiralty jurisdiction, it reduces the extent of the admiralty jurisdiction which was granted to the courts by the Constitution, and which cannot be reduced by Congressional action. As stated by Professor Thomas Reed Powell in the Michigan Law Review, Volume 20, page 477, "The fundamental Constitution in 1920-1921," this point has been overlooked by this Court in its recent decisions relating to the immunity of public vessels.

2. The Resolution impairs the substantive in-

> ternational maritime law and tends to the destruction of life and property on navigable waters, by creating a fleet of irresponsible vessels and by declaring that the failure of the large number of interned vessels already in the admiralty jurisdiction to observe the centuries-old collision rules of the admiralty law shall not subject such vessels to the ordinary liabilities of the maritime law. These collision rules are economically and equitably necessary, and are designed to protect lives and property on navigable waters."

In *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 161, Mr. Justice McReynolds, delivering the opinion of this Court, said:

> "The Constitution itself adopted the rules concerning rights and liabilities applicable therein, and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true it is quite impossible to account for the multitude of adjudications by the admiralty courts."

The mere fact that the master of the *Antigone* was appointed by an officer of the United States, Frank H. Phipps, did not make the master himself an officer of the United States or *ipso facto* entitle his vessel to immunity from obeying the ordinary collision rules and the process of the admiralty courts.

In *Gableman* v. *Peoria Ry. Co.*, 179 U. S. 335, 338, 339, 340, this Court said:

> "The receiver rested his contention that the case arose under the Constitution and laws of the

109

United States on the single ground of his appointment by the Federal Court.* * * Nor are the cases against United States officers as such, or on bonds given under acts of Congress, or involving interference with Federal process, or the due faith and credit to be accorded judgments, in point. The question is whether the bare fact that the appointment of this receiver was by a Federal Court makes all actions against him cases arising under the Constitution or laws of the United States. * * * In *Bausman* v. *Dixon* we ruled that a judgment against a receiver appointed by a Circuit Court of the United States, rendered in due course in a state court, does not involve the denial of an authority exercised under the United States or of a right or immunity specially set up or claimed under a statute of the United States. That was an action to recover for injuries sustained by reason of the receiver's negligence in operating a railroad company chartered by the State of Washington, though the receiver was the officer of the Circuit Court, and we said: 'It is true that the receiver was an officer of the Circuit Court, but the validity of his authority as such was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or, so far as appears, in the state Supreme Court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the Circuit Court appointing a receiver did not create a Federal ques-

tion under section 709 of the Revised Statutes, and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the state court. The liability to Dixon depended on principles of general law applicable to the facts, and not in any way on the terms of the order.' And although that was the case of a writ of error to a state court, we applied the reasoning in *Pope* v. *Louisville &c. Railway Company* in which the right of appeal to this court from the Circuit Court of Appeals was asserted on the ground that the case arose under the Constitution and laws of the United States, because Pope was a receiver of a Federal Court. We decided that the suit was ancillary to the original cases in which the receiver was appointed, and that the jurisdiction was dependent on the ground of jurisdiction in those cases, and we also held that the receiver's orders of appointment were not equivalent to laws of the United States in the meaning of the Constitution, and that the mere order of a Federal Court, sitting in chancery, appointing a receiver, did not in itself form adequate ground of jurisdiction."

In *Walters* v. *Payne*, 292 Fed. 124, 127, the United States Circuit Court of Appeals for the Third Circuit, said:

> "The action does not arise under the laws of the United States, because the President under a law of the United States appointed the agent against whom the common-law action might be litigated in the proper court. *Gableman* v. *Peoria, Decatur & Evansville Railway Co.*, 179 U. S. 335."

ELEVENTH POINT.

By granting immunity in the present case this Court would be extending the theory of immunity beyond any of its existing decisions.

The furthest extent to which this Court has stretched the theory of immunity was in its decision in the *Western Maid*, 257 U. S. 419.

But in that case the Government admittedly had either full legal title to the vessels or owned them *pro hac vice* under a demise or lease under which the United States assumed all marine and war risks and the special obligation of returning the vessels at the end of the war, free from collision liens and physical injuries together with full agreed compensation for their war use (See *Requisition Bare Boat Charters, Record, Western Maid* case).

Moreover, each of the vessels in that case had a written commission or certificate from the President or a Cabinet Officer or the Bureau of Navigation.

Furthermore, the *Western Maid* and the *Liberty* were manned by commissioned officers and enlisted crews of the United States Navy "and the *Carolinian* had been assigned to the War Department of the United States and was employed by it as an Army transport, being manned by an Army crew furnished by the War Department" (Brief of District Judge Rose in this Court with reference to the *Carolinian*, p. 6).

As to the *Carolinian* the United States agreed to assume war and marine risks "including all risk of liability for damage occasioned to other vessels, persons or property" (Government's petition in *Carolinian* case, p. 32).

The title of the United States to the vessels in the *Western Maid* case was therefore both undisputed and shown by the evidence.

The fact having been established that the vessels were owned by the sovereign the question then arose whether they were employed as merchant vessels.

But this latter question does not arise in the present case, because the Government has not yet proved the condition precedent that it had confiscated or promised to pay for a property interest in the *Antigone*. If the Government did not have a property interest at the time of the collision it had at that time no interest in any recovery by the libellants other than as custodian or receiver. This interest was insufficient to exempt the vessel from obeying, and being subject to liens for violation of, the ordinary admiralty collision rules.

Should the Court in the present case further expand the theory of immunity? Will the Court prefer an abstract theory of sovereign immunity which, in a republic apparently has no practical or equitable significance, and which has no historical place in the international admiralty law, to the practical social necessity of subjecting to effective control by fixed and enforceable collision rules vessels which are navigating in our harbors and on the seas and which are endangering lives and property on other vessels?

In the Harvard Law Review, Vol. 34, page 165, it is said:

> "It is in accord with the spirit of the times to assert the justice and expediency of general state liability for torts (32 Harv. L. Rev. 447; 30 Harv. L. Rev. 20; 19 Col. L. Rev. 467). A tendency of the several states to assume liability for torts in

certain instances can be noted (30 Harv. L. Rev. 25; 32 Harv. L. Rev. 447; 30 Harv. L. Rev. 20; 19 Col. L. Rev. 467). The United States has recently assumed liability in several matters of a tortious nature. The holder of a patent is protected against infringement by a servant of the government (Act of June 25, 1910, 36 Stat. at L. 851. See *Cramp & Sons* v. *International Co.*, 246 U. S. 28 (1918)). A Workmen's Compensation Act (U. S. Comp. Stat. 1916, §8932) protects federal employees. Persons injured by government operation of the railroads have the same remedy as before (Act of March 21, 1918, 40 Stat. at L. 456, §10. See *Dahn* v. *McAdoo*, 256 Fed. 549 (1919)). Vessels of the Shipping Board leased or chartered to private operators and used as merchant ships may be libeled in event of liability incurred in operation just as a privately owned vessel (39 Stat. at L. 529, §9. See *The Lake Monroe*, 250 U. S. 246 (1919); *The Florence H.*, 248 Fed. 1012 (1918)). Congress has even directed the War and Navy Departments to adjudicate claims for property damages done by training operations including use of airships (Act of July 11, 1919, chaps. 8, 9), and *to compensate for damages done by the expeditionary forces in allied countries in accordance with the law of those countries* (Act of April 18, 1918, 40 Stat. at L. 532)." (Italics ours.)

In "Responsibility of the State in England," by Harold J. Laski, 32 Harvard Law Review, 447, 453, it is said:

"Government must pay where it wrongs. There are no arguments against it save, on the one hand,

> the dangerous thesis that the state-organs are above the law, and on the other, the tendency to believe that ancient dogma must, from its mere antiquity, coincide with modern need."

With the greatest respect, we submit that the theory of immunity applied by this Court in the *Western Maid* case, has been quite generally criticised as unsound, inequitable, and impracticable, and as opposed to the practice of the admiralty courts of other nations.

It tends, moreover, to the destruction of life and property on navigable waters by creating a great fleet of irresponsible vessels which have no obligation to observe the centuries-old collision rules of the admiralty law, whose purpose is to protect life and property at sea.

The theory applied to a case like the present would seem, moreover, to be constitutionally and philosophically unsound. It appears to be based on the doctrines of the Austinians and Nominalists, rather than on the modern and practically significant philosophy of the Pragmatists and Realists. The latter would seem to be characteristically the philosophy of the Constitution and the sovereign which should be adopted by an American court. Paul Vinogradoff, Common Sense in Law, pages 34 and 207; Edward Jenks, State and Nation, page 208; James T. Young, New American Government, page 276; Joseph Story on the Constitution, page 197.

Social utility, the adoption of the legal rule tending to safety of life and to uniformity of observance of reasonable collision rules, would seem to be preferable to theorizing on the Monistic and absolute nature of an Austinian State and its immunity from "commands" and "power."

Benjamin N. Cardozo, The Growth of the Law (1924), page 117;

Harold J. Laski, Foundations of Sovereignty,

Roscoe Pound, Spirit of the Common Law, pp. 83-84;

Harold J. Laski, Foundations of Sovereignty, pp. 126; 109;

Frederic J. Stimson, Popular Law Making, p. 10;

James C. Carter, Law, Its Origin, Growth and Function, pp. 6, 8; 13-14;

John Chipman Gray, Nature and Sources of Law, 1921 ed., pp. 74, 233, 288;

John W. Salmond, Jurisprudence, pp. 202-203;

J. M. Lightwood, Nature of Positive Law, p. 417;

Paul Vinogradoff, Outlines of Historical Jurisprudence, p. 86;

James Bryce, Studies in History and Jurisprudence, p. 538;

Jethro Brown, Austinian Theory of Law, p. 194.

In "Pound's Juristic Philosophy," 18 Illinois Law Review, it is said (p. 294):

> "While we may study law in its logical aspects we should by no means identify law with logic, any more than we should identify it with religion, politics, or morals. *Identify it with the authority of kings and it begins to be capricious,* arbitrary, and oppressive; * * * and finally, identify it with logic and it soon degenerates into a mechanical rule invested with mysterious technicality."

And at page 295:

> "The 'jurisprudence of conceptions' is based on the unenlightened belief that whatever is logically consistent should necessarily be a rule of life, and that a definition implies the duty of enforcing it * * * A good logician would never mix up questions of logic with the problems of life."

And at page 298:

> "For Pound, as for Jhering, the ultimate sanction of a right lies, not in the right itself, but in the social demand for its enforcement * * *. The thing which we have constantly to bear in mind is that it is one of the principal functions of law to safeguard the general public against all arbitrary and oppressive acts on the part of those who may happen in a given time and place to possess the power to oppress or otherwise wrong or exploit their fellowmen. The power is not necessarily political in nature * * * All sorts of power are subject to abuses and it is the function of law to prevent arbitrariness in the exercise of any power."

In an article entitled "Admiralty Jurisdiction of Late Years" in the Harvard Law Review, March, 1924, Volume 37, page 528, 541, Charles Merrill Hough, United States Circuit Judge at New York, wrote as follows:

> "It is the safest of assertions that the mainspring of effective admiralty power is the maritime lien. The American concept of that *jus in re*, as a proprietary interest in an offending *res* arising contemporaneously with the cause of ac-

tion, is elementary learning, resting on the authority of classical decisions of the Supreme Court. In the whole maritime anthology of that Court, no single flower is so important. Not only does the lien arise with the cause of action, but the right to enforce it sometimes is the cause of action. Of this, *The China* is the perfect instance.

The conservatism manifested in respect to liens for making, repairing, and supplying vessels was suddenly and, indeed, violently abandoned in *The Western Maid,* which held that no lien for collision ever arose against vessels owned (absolutely or *pro hac vice*) by the United States; wherefore, when government ownership and possession ceased, the persons injured were no better off than they were before.

The admiralty has suffered no more than other jurisdictions from the chronic dislike of sovereigns (however democratic) to pay for wrongs done; and the proposition that if you could not sue the sovereignty you could not seize its property or disturb its possession thereof followed as of course. But the sacred lien, it was believed, existed; because if *The China* (and its like) announced the law, the personified ship was affected with a proprietary interest capable of fruitful enforcement as soon as the sovereign's protecting hand was removed. Furthermore, this belief had been supported by two decisions, which quite possibly did not require the reasoning used, but which, as decided, were flat to the effect that, in respect of a vessel belonging to the United States, 'inability to enforce a claim is not inconsistent with its existence' for the existence 'even of a lien is not always dependent upon the ability of the holder to enforce it by legal proceedings';

and further that 'a lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control.' These propositions were held over the dissent of Nelson, *J.*, who asserted that 'if the owner of the offending vessel is not liable at all for the collision—it follows there can be no lien'—a singular contention to be made when the ink was hardly dry on *The China* opinion. In short, although the same result might have been reached in another way, *The Siren* held that the reason why the collision claimant prevailed was that he had a lien which the Court would compel the United States to recognize when it needed the services of a judicial tribunal to condemn the offending ship as prize.

This was a logical application of the *jus in re* doctrine so carefully nursed by the Court, and served even governments well enough until the United States, for the first time in its history, had two large merchant fleets, one of chartered vessels which it had contractually engaged to redeliver to owners free and clear of obligations, and one of owned vessels which it wished to sell to purchasers, who insisted on a guaranty of freedom from liens.

What was wanted was freedom from contractual obligations, and this result it reached by successfully maintaining, in *The Western Maid*, that 'the law merchant personified the commercial ship, not a public ship,' thereby inducing the Court posthumously to follow Justice Nelson in part.

But mere acquiescence in the Solicitor General's proposition would not do, and Holmes, *J.*, for the Court announced one piece of law which goes far beyond the necessities of this admiralty

question, as to which no one could deny that the Court could always do what it had done before and discard *The Siren* as coolly as it once did the limitation of jurisdiction by the ebb and flow of the tide.

That single controlling proposition is that 'the United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort.' When it comes to hurdling a legal difficulty Holmes, *J.*, is *hors concours*, but in this effort has has surpassed himself.

The differentiating of *The Siren* and the silence maintained as to *The China* in the opinion are fully treated in the dissents, McKenna, *J.*, demonstrating that the Court has followed the dissent in the first decision and said nothing about the second because there really was nothing to say.

But the harm to the tradition of admiralty is not in the lip-service to previous decisions which this opinion renders worthless, but in the tone of mockery displayed in every reference to the doctrine of a lien attaching regardless of the shipowner's personal liability. 'Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp'—which asserts that Justice Field saw ghosts in *The Siren*. That a ship for purposes of lien may be regarded as a person 'is a fiction not a fact, and as a fiction it is a creation of the law'; therefore, by suggestion, it is unworthy of consideration—a thought rather staggering when one remembers the part that fictional venue in transitory actions has played in law development. But also 'it is totally immaterial that in dealing with private

wrongs the fiction, however originated, is in force,' for 'there is no mystic over-law to which even the United States must bow—therefore, away with the fiction when the government is concerned. All these quotations are not vital to the main proposition and it remains true that, when the hurdler has jumped, the obstacle remains. So liens remain but so bespattered by language that the traditionalist remembers the old song:

> 'It ain't so much as wot 'e said,
> As the narsty w'y 'e said it.'

The holding which disposed of the case may be put thus: if there is no right to sue for tort, there is no tort. This is not a maritime question at all; but it disposes of an admiralty cause by refining on the meaning of a word unknown to the historic admiralty, though it is unquestionably naturalized in America. The word that is known to admiralty is collision; so that perhaps, in defiance of syllogistic canons, the bar will state the rule in *The Western Maid* thus: 'The United States has not consented to be sued for collisions; therefore, in a legal sense, there was no collision.' The Bumbles of the shipping world will pass the usual comment on this rule, which for 'interstitial' law-making takes the very highest rank.

The years since 1906 have not increased the certainty of maritime law, and they have impaired the tradition of enforceable customs of the sea."

In "A Review of Reviews in Admiralty" in the American Law Review, volume 56, page 770, it is said:

> "A recent decision of the Supreme Court of the United States in which the majority opinion

is written by Mr. Justice Holmes (*United States* v. *The Western Maid*, pet. 1922, U. S. Sup. Ct., Oct. Term, 1921, Nos. 21, 22, 23) evidences an application to the admiralty of the Austinian theory that as all law is given by the sovereign no subject can have any rights against that sovereign, in limitation of a jurisdiction formerly admitted to exist. It would appear to work prejudice to 'characteristic features' (*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149 (1920) of the general maritime law. In the sense of Mr. Justice Holmes that law is not '*corpus juris*' (*Sou. Pac. C.* v. *Jensen*, *supra*); if supplemented as it has come to be by the common law it is by the 'fiat of the judges,' since not adopted by act of Congress. He admits in *The United States* v. *The Western Maid* (*supra*), that 'however ancient may be the tradition of the maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic overlaw to which even the United States must bow.' The absence of positive statutory remedy in the principal case serves as justification in his opinion for adoption of the common law doctrine in derogation of the implied jurisdiction of admiralty and established precedent in the maritime jurisprudence of this country, although to use the words of Mr. Justice Holmes, the common law itself is not 'a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign.' If this decision does violence to approved rules of the general maritime law, 'adopted and established as part of the laws of the United States' by the

Constitution (*Knickerbocker Ice Co.* v. *Stewart*, *supra*): if these rules are consistent with that which is acknowledged in American jurisprudence to consist with the laws of the sea and of nations, this adjudication is futile to disestablish a maritime obligation which 'rests upon the common consent of civilized nations.' (14 Wall. U. S. 170, 187, 175 U. S. 577, 711.) The absence of statutory enactment is made the basis for this decision. But the Supreme Court has held: 'The bounds and limits of admiralty jurisdiction are matters of judicial cognizance and cannot be affected or controlled by legislation whether state or national.' (*Butler* v. *Boston Steamship Co.*, 130 U. S. 527.) Where constrained by the general maritime law it may not be changed by adoption of common law rules. This is peculiarly the case when jurisdiction turns upon the existence of a pure maritime lien 'over which the common law affords no remedy.' (*The Moses Taylor* (1866), 71 U. S. (4 Wall.) 411, 18 L. Ed., 397; *The Hime* v. *Trevor* (1866), 71 U. S. (4 Wall.) 555, 18 L. Ed., 451.)

'The preponderance of authority is with the dissent,' declares the California Law Review (May, 1922, Vol. X., p. 333). Like disapproval is read in the carefully prepared comments of the Columbia and Michigan Law Reviews. (Col. Law Rev., June, 1922, Vol. XXII, No. 6, p. 589; Mich. Law Rev., Feb. 1922, Vol. XX, No. 5, p. 533.) The Illinois Law Review (May, 1922, Vol. XVII, No. 1, p. 57), while differing from the reasoning of the Court, sustains its holding. Its analysis of the case and highly technical application of theory would be acceptable were this case not one in which fundamental concepts of the general maritime law

are controlling, were not adjudication constrained by 'a very limited body of customs and ordinances of the sea.' (*Sou. Pac. Co.* v. *Jensen*, *supra*, dissent of Mr. J. Holmes.) The vessels dibelled for collision damages while in the public service of the United States had been turned back prior to the proceedings to former owners, one being delivered to the U. S. Shipping Board and the other two, redelivered to private parties. 'The ultimate question was whether after the disability to sue, because of the possession of the United States was removed, a cause of action in admiralty remained.' Deciding in the negative, the majority of the Court held, in effect that the disability to sue to enforce claims against such vessels in the first instance was inconsistent with its existence, no tort relations being created; that merely 'anomic' relations ethical in character subsisted, upon which no action could be based. (Ill. Law Rev. *supra*. See also 'Nomic and Anomic Relations,' Cornell Law Quarterly, VII 11) The doctrine of the learned writer in the California Law Review that the legal relations were 'Mesonomic' does not alter the fact that by the general maritime law the claim subsists in law as a real right independent of possession, *in rem*, and good against all the world. The opinion of the Illinois Law Review that Mr. Justice Holmes' doctrine that there can be no legal claim against the sovereign because 'the authority that makes the law is itself superior to it' is 'sound political and irrefragible legal doctrine,' without which law would be moralistic chaos and 'the concept of the state swept to the four winds of the class struggle,' is answered by the California Law Review, holding that the doctrine that the

sovereign is immune from suit rests upon practical grounds of public policy and that it has no useful or beneficial application in the principal case. 'There is plenty of authority for the proposition that a lien attached at the time of the collision, irrespective of ownership, and is carried with the vessel 'into whosesoever hands it may come.' Nor is this a fiction. The enforcement of the lien would afford compensation to the injured party without either hindering the public service or endangering the public safety. * * * *Cessante ratione legis cessat ipsa lex.'* Were the theory propounded by the Illinois Law Review properly applicable it would have to be admitted that the principal case was successfully differentiated from *The Siren* (7 Wall. 152, 19 L. Ed. 129. 'The present cases, however, proceed on the negation of the lien itself. * * * The result would seem to be that henceforward there can be no proceeding *in rem* against property which was in the possession of the United States at the time when the cause of action accrued. Unless a maritime lien arises out of the transaction itself, admiralty jurisdiction *in rem* is unthinkable, for such liens are not created by subsequent agreements. Nothing subsequent can supply an original lack of vitality. It is difficult to reconcile the decision with *The Siren, supra*, the *Davis*, 10 Wall. 15, and *U. S.* v. *Lee*, 156 U. S. 196.' (Michigan Law Rev. *supra.*) The opinion 'seems inconsistent with *The Siren*,' reiterates the Columbian Law Review, 'for if there is no claim, it is difficult to see how there is a liability to be enforced when, by the act of the government, the vessel comes under the control of the Court.' (See Lord 'Admiralty

Claims against the Government,' 1919, 19 Col. Law Rev. 467.)

That Federal judicial opinion is drifting away from the great beacons of maritime law established by the founders of American admiralty jurisprudence is discernible to the observer. The father of the American admiralty system, Judge Richard Peters, holds: 'If by our own municipal laws, there are rules established, our Courts are bound exclusively to follow them. But in cases where no such rules are instituted, we must resort to the regulations of the maritime countries which have stood the test of time and experience, to direct our judgments as rules of decision.' (*Thompson, Jacobsen et al.* v. *The Ship Catherina*, 1 Peters Admiralty 104, 1795); and again: 'The provisions of the general maritime laws and the principles of the Roman or civil law, I am bound to respect, when relevant to points before me, in decisions on the admiralty side of this Court.' (*Watson* v. *The Ship Neptune*, 1 Peter's Admiralty, 142, 1800.) The more restrictive attitude of the Federal Courts is illustrated in the holding: the maritime usages of foreign nations are not obligatory upon the Courts of the United States, nor will they be respected as authority 'except so far as consistent with the well settled principles of English and American jurisprudence.' (252 Fed. 267; for further discussion see University of Pennsylvania Law Review, March 1922, Vol. LXX, No. 3, p. 185; Illinois Law Review, May, 1922, Vol. XVI, No. 1, p. 1). In respect to the facts in the principal case, it is submitted that aside from precedent in Roman law and the jurisprudence of civil law countries, the decision is a

departure not only from the historic viewpoint of American Courts but from British practice. (Michigan Law Review, February, 1922, Vol. XX, No. 4, pp. 407, 415-16). The British Courts differ essentially in their definition of maritime lien from American; it is a creature of the *lex fori.* (California Law Review, May, 1922, Vol. X, No. 4, p. 311.) Mr. Justice Storey has defined the true function of the admiralty court in respect to the obligation of the maritime lien: 'Where a lien exists upon property, upon general principles of justice, *jure gentium* that lien ought to be presumed and admitted by every sovereign until the presumption is repelled by some positive edict to the contrary.' (*United States* v. *Wilder*, 1838, 3 Sumner, 308, Fed. Cas. No. 694.)

It would appear that the majority opinion in the principal case has overlooked the true character of the right *'in rem'* or maritime lien. It is not based on 'tort' a violation of a private right remediable in a court of common law jurisdiction: but as said by Marshall: 'A court of admiralty does not seek to assert in behalf of a libellant a personal demand against a specific thing, the property of another, and give it the validity of a *jus in rem*, for, * * * the *jus in rem* subsists independently of possession if not state of title.' (*Rose* v. *Himely* (1808), 10 U. S. (6 Cranch) 281, 3 L. Ed. 224.) It is an appropriation of the thing made by the maritime law under the Constitution in the nature of the tacit hypothecation of Roman law. It does not pre-suppose an action against a person but against the vessel. Even if the personality of the ship be 'merged in that of

the sovereign,' this fact can in no way affect the validity of the lien. It arises *jure gentium* and not by the *lex fori* and survives by the law of nations."

In the Columbia Law Review, Volume 22, page 589, it is said:

"RECENT DECISIONS.

ADMIRALTY—MARITIME LIEN ON GOVERNMENT VESSEL—EFFECT OF SUBSEQUENT TRANSFER OF VESSEL.—A vessel had been chartered to the United States under a bare-boat charter and was employed as an army transport. While so engaged a collision took place. Afterwards, the vessel was returned to the owners and a proceeding *in rem* for the collision instituted. A petition for a writ of prohibition to prevent the District Court of the United States from exercising jurisdiction of the proceedings was brought. Held, Mr. Justice McKenna, Mr. Justice Day and Mr. Justice Clarke dissenting, the writ of prohibition should be granted. *The Western Maid* (1922), U. S. Sup. Ct. (Oct. T. 1921) Nos. 21, 22, 23.

It is the established rule in Admiralty that a collision between two vessels gives the injured party a present right of property, a *jus in re* in the offending ship, which follows the ship into the hands of all purchasers. *The Bold Buccleugh* (1851), 7 Moore, P. C. 267; see *The John G. Stevens* (1898), 170 U. S. 113, 115 *et seq.*, 18 Sup. Ct. 544. The vessel itself is regarded as the wrongdoer, liable for the tort and subject to a maritime lien for the damages. See *The John G. Stevens*, *supra*, 120. A vessel owned by the United States

> is immune from proceedings *in rem*. See *The Siren* (1868), 74 U. S. 152, 154. This, however, is solely a procedural limitation and the vessel is subject to all claims against it when by the affirmative action of the government the vessel becomes subject to the court's jurisdiction. *The Siren, supra;* see *The Davis* (1869), 77 U. S. 15, 21. The vessel has committed a wrong, for which, on grounds of public policy, there is no redress while owned by the government. See *The Siren, supra*, 155. When, however, such a vessel comes into the hands of a party capable of being sued, the claim against the vessel should become enforcible. To hold, as the instant case in effect does, that the ship has committed no offense because the claim could not be enforced while the government owned the vessel seems inconsistent with *The Siren;* for if there is no claim, it is difficult to see how there is any liability to be enforced when, by the act of the government, the vessel comes under the control of the court. See Lord, Admiralty Claims Against The Government (1919), 19 Columbia Law Rev. 467. The case seems inconsistent with the admiralty concept which regards the ship and not the owner as the offender."

In the Michigan Law Review, Vol. 20, p. 533, "Maritime Law—Personality of Ship—Immunity of Government Property," it is said:

> "The recent opinions of the Supreme Court in the three cases of the *Western Maid, Liberty* and *Carolinian* (U. S. Sup Ct., January 3, 1922) emphasize the non-liability of national ships in cases of collision. The *Western Maid,* owned by

the United States and manned by the navy, was in collision in New York Harbor. The *Liberty* was a pilot boat under charter to the Government and had a collision in the harbor of Boston. The *Carolinian*, also a chartered ship, had done similar damage in Brest, France. The two latter had been re-delivered to the owners, and the former to U. S. Shipping Board, when the libels were filed, so that the process in no way interfered with the possession of the sovereign. In each case the Supreme Court issued its extraordinary writ of prohibition to prevent district courts from exercising jurisdiction.

It had been the general opinion that ships of the Government incurred the same liability as those of individuals on account of maritime transactions, although that liability might not be enforced where it would be necessary to take the *res* out of the possession of the Government by any writ or process of the Court. *Davis*, 10 Wall. 15. The practice prevailed, to some extent at least, of filing a libel *in rem*, without the prayer for process, and requesting an appearance on behalf of the United States, in analogy with the English practice described in *The Siren*, 7 Wall. 152, 154. The existence of the maritime lien was assumed and suits *in rem* have been frequent, subject to the rule that property of the Government might not be attached unless it could be done without disturbing the possession of the United States. Thus the books contain suits for general average, *U. S.* v. *Wilder*, 3 Sumner 308; salvage, *U. S.* v. *Morgan*, 99 Fed. 572; sailor's wages, *St. Jago de Cuba*, 9 Wheat. 409; and material-men's claims;

Rev. Cutter No. 1, Brown's Admiralty 76. All cases of this nature pre-suppose the existence of a maritime lien, inherent in the *res* itself. If the Government consented to the suit, or if the suit could be prosecuted without disturbing its possession, the lien was enforced as in ordinary cases. The present cases, however, proceed on the negation of the lien itself, 'Legal obligations that exist but cannot be enforced are ghosts that are seen in the law, but that are elusive to the grasp.' The result would seem to be that henceforward there can be no proceeding *in rem* against property which was in the possession of the United States at the time the cause of action accrued. Unless a maritime lien arises out of the transaction itself, admiralty jurisdiction *in rem* is unthinkable, for such liens are not created by subsequent agreements. Nothing subsequent may supply an original lack of vitality. It is difficult to reconcile the decision with *The Siren*, *supra*, the *Davis*, 10 Wall. 15, and *U. S.* v. *Lee*, 106 U. S. 196.

The brilliant writer of the majority opinion, Mr. Justice Holmes, answered the fundamental question, What constitutes the law? by 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law' (Collected Legal Papers, 173). In the same address, the body of reports, treatises and statutes are called 'the sybilline leaves in which are gathered the scattered prophecies of the past upon the cases in which the axe will fall.' The metaphor is a striking one; according to Vergil (Aeneid, III, 452), the Sibyl wrote her prophecies on the leaves of trees and so arranged

them within the cave that the approach of inquirers blew them into such confusion that their meaning became incomprehensible—*inconsulti abeunt sedemque odere Sibyllae.* The line will fit more than one admiralty practitioner whose clients are asking opinions about cargoes, for instance, lost in a collision between a car ferry operated by the Director General of Railroads and a Navy Transport allocated to the Shipping Board. The goal of the law is stability in fundamentals and the maritime law has enough reports and treatises and statutes to furnish a more substantial foundation than foliage, but its students are finding more truth than poetry in the metaphor. This will be more evident if the decision indicates a modification of the underlying doctrine of the personality of the ship. The minority of the Court, in a vigorous dissent, would seem apprehensive of this result. Such a consequence would be unfortunate. The basis of admiralty jurisdiction, and the only reason for not blending it with the common law, is its proceeding *in rem*, and that proceeding depends on the theory of maritime liens, which, in itself, rests upon the individuality of the ship. From the standpoint of business, the ship cannot sail without credit and it cannot have credit without maritime liens. These are familiar platitudes, but they are derived from the inherent nature of the business itself. Another is that capital cannot be secured for the business unless the investor can be assured of a definite limitation of liability, and this ultimately depends upon the personification of the ship. Tradesmen will not furnish a ship with supplies nor salvors aid

her in peril unless they have the assurance of the lien. The importance of the lien is quite as important in matters of tort, although not as conspicuous, since, for example, it is one of the elements of the underwriter's rate of premium for the running-down clause in the marine policy. At a time when we are making a colossal effort to establish a mercantile marine, with ships publicly, and not privately, owned, it will be unfortunate to impair their credit and segregate them further from the settled channels of the general maritime law. The majority opinion, it is true, warns us that 'we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic overlaw to which even the United States must bow.' There is, however, a very plain and definite law, to which even the United States must bow if it is to succeed in maritime affairs, and that is the general maritime law, or common law of the sea, and the established practices and requirements of the business."

CONCLUSION.

The claim or suggestion of the United States Attorney should be dismissed because not proved and because not presented by a proper officer; or should be regarded as a submission to jurisdiction enabling the collision lien to be enforced as a cross or intervening claim.

Respectfully submitted,

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Appendix.

In *Furness, Withy & Co. v. Miller*, (unreported; May 11, 1925, Supreme Court Dist. of Col.), the Court said, in part:

"As stated above, the proposition of plaintiff, briefly stated, is, that the claim sued upon is one arising under Section 12, of the Trading with the Eenemy Act, construed and applied in the light of the Executive Orders, *supra*.

As originally enacted, the Trading with the Enemy Act, with the exception of Section 12, had to do chiefly with the seizure and prompt liquidation of alien enemy property; in respect of which, its provisions were direct and explicit, or, at least, were quite evidently intended so to be. So far, however, as concerned the matter of continuing the business as a going concern of property seized, and which, from the nature of the property so seized, might appear to be necessary in order to prevent waste or for its protection, the provisions of the Act were more or less imperfect—doubtless the necessary details had not then been comprehensively worked out or determined. At any rate, and whatever may have been the reason, Section 12, having authorized, in general terms, the continued management, by the Alien Property Custodian, of property seized, with all the powers of a common-law trustee, and in like manner as though he were the absolute owner thereof, authorized the President of the United States to prescribe rules and regulations in respect thereof. Such rules and regulations were so prescribed and promulgated; and the question now arises whether said Section 12, and the Executive Orders issued thereunder, authorize a suit such as the present.

As already indicated, said Section 12 clearly contemplated that certain of the property seized should continue to be operated, and it conferred authority so to do, although in somewhat general terms; leaving the details to be supplied by rules and regulations by the President. Therefore, when such rules and regulations came to be prescribed, as they later were (Executive Orders Nos. 2813 and 2916, *supra*), they became part of the law itself; certainly to the extent that they are embraced within the limitations of the authority so conferred.

The President authorized the continued conduct and operation of the business of a going concern, including the right of purchase and sale, both of materials, supplies, commodities, and product; he authorized the Alien Property Custodian to file, prosecute and maintain any claim or suit growing out of transactions had prior or subsequent to seizure but growing out of the conduct or operation of such business; he authorized the Alien Property Custodian *to prosecute or defend, as the case may be;* and, evidently in order that there might be no misunderstanding about the matter, but none the less significantly, he exempted the Alien Property Custodian, and his agents, managers, etc., from *personal liability* concerning any matter, debt, or obligation of any kind growing out of the conduct or operation of any going business or concern, except in the event of international injury or fraudulent misconduct.

It would seem unthinkable, as it would be both unreasonable and intolerable, to assume that Congress contemplated or intended to clothe the Alien Property Custodian with full power and authority to engage in business, but with immunity from obligation of any kind whatever in respect thereof to those with whom he might

happen to do business; since that must be the logical conclusion of an asserted immunity from suit.

If the allegations of fact contained in the complaint be true, for the purpose of the motion to dismiss, the Court must assume that they are true, the plaintiff has sustained an actual loss and damage in large amount, growing out of a final payment of $120,000, it was improperly induced to make by an agent and representative of the Alien Property Custodian; the transaction itself growing out of the conduct and operation of a going business and concern seized by the Alien Property Custodian; and which payment, thereupon, found its way into the gross assets, amounting, thus increased, to some $660,000, of the alien enemy whose property was seized. In other words, the alien enemy corporation has been enriched by moneys of plaintiff, and to which in equity it is not entitled.

Accordingly, it is the opinion of the Court that the motion of defendants to dismiss the complaint should be *overruled.*"